WESTERN LAW JOURNAL.

DECEMBER, 1847.

THE LAW OF COPYRIGHT WITH RESPECT TO ABRIDGMENTS.

HAVING recently had occasion to look into this subject, I propose to state the result of my inquiries in this journal.

I. There is no common law of copyright in this country. This was settled in the maturely considered case of *Wheaton* v. *Peters*, 8 *Pet. Rep.* 591, and on very nearly the same course of reasoning as that by which a similar conclusion was arrived at in England, in the cases of *Miller* v. *Taylor*, 4 *Burr.* 2303; *Donaldson* v. *Becket*, 4 *Burr.* 2408; and *Beckford* v. *Hood*, 7 *Term Rep.* 620. The question of abridgments, therefore, must depend upon the construction given to the statute law.

II. The *terms* of the act of Congress do not necessarily require such a construction as will permit abridgments. The persons whose right is secured must be "*authors*," the same term used in the English statute: and according to Webster, the word *author* signifies "one who produces, creates, or brings into being; the beginner, former, or first mover of any thing, as God is the author of the universe." Its derivation is said to be from *augeo*, to increase; because an author is presumed to add something to the sum of human knowledge. The word *author* was formerly used as a verb; and then, according to Richardson, who furnishes numerous examples, it signified "to cause a beginning, a foundation; to found, invent, devise, create; to give credit, influence, support, power." Now in this sense, an abridger has no claim to be regarded as an author. For what is the meaning of *abridgment?* According to Webster, the verb signifies "to make shorter; to epitomise; to contract, by using fewer

words, yet retaining the sense in substance;" and the noun signifies "an epitome; a compend, or summary of a book." Richardson gives numerous examples, and among them this from Locke: "For he supposes it (the Apostles' Creed) an *abridgment* of faith, by containing only a few of the necessary articles of faith, and leaving out the far greater part of them; and so takes a part of a thing for an *abridgment* of it; whereas an *abridgment* or abstract of any thing is the whole in little, and if it be of science or doctrine, the *abridgment* consists in the essential or necessary parts of it, contracted into a narrower compass than where it lies diffused in the ordinary way of delivery." Perhaps one of the best illustrations may be given by saying, that an abridgment is to the original work what a miniature is to a full sized portrait. In no fair meaning of the terms, therefore, can an abridger be regarded as an author, if these definitions be correct; for he does not originate, create, or augment; but simply reduces or contracts what others have produced.

III. To permit abridgments is in contravention of the spirit and object, if not the very letter of the legislative provisions. The object declared by the framers of the Constitution is "to *promote* the progress of science and useful arts;" and this is to be effected "by securing for limited times to authors and inventors the *exclusive* right to their respective writings and discoveries." Accordingly, our copyright law secures to authors and their assigns "*the sole right and liberty of printing, reprinting, publishing and vending*" their works, and prohibits all other persons from interfering with this "*sole right.*" Now, if an abridgment be "the whole in little," according to Locke's idea; if it contain "all the essential or necessary parts" of an author's work, what becomes of his exclusive property in that work? For where can you draw the line as to the quantity taken, or the scale of reduction? Shall it be one half, three fourths, nine tenths, or ninety-nine hundredths? In short, who does not perceive, that if you once open the door to abridgments, you fritter away the exclusive right in literary property until it becomes almost worthless? While you prohibit one man from copying the whole of the work of another, you allow him to take any part less than the whole; and the nearer the whole the better, because the more perfect the abridgment. In a word, while you profess to encourage a race of intellectual lions, you actually afford your protection to a set of jackals.

IV. The right to make abridgments is not settled by any American decision, although frequently taken for granted both by authors and Judges: and the English cases leave the whole subject in the greatest uncertainty not only as to the kind of works which may be abridged—as, whether narrative or descriptive only, or scientific also,—but as to what are the tests of a *fair* or *bona fide* abridgment—as, whether the injury done to the original work by competition, or the quantity of matter copied verbatim, or the greater or less degree of fidelity in preserving the sense of the work abridged, shall be the controlling consideration. In fact, only one thing seems to be settled as a test of fairness, and that is a negation—namely, that the intention of the abridger has nothing to do with the question. To prove these positions, I subjoin quotations from some of the principal text writers, and an abstract of the leading cases.

Story, in his Commentaries on Equity, § 939, says: "It is clearly settled not to be any infringement of the copyright of a book, to make *bona fide* quotations or extracts from it, or a *bond fide* abridgment of it; or to make a *bona fide* use of the same common materials in the composition of another work; and a work consisting partly of compilations and selections from former works, and partly of original compositions, may be the subject of copyright. But what constitutes a *bona fide* case of extracts, or a *bona fide* abridgment, or a *bona fide* use of common materials, is often a matter of most embarrassing inquiry. The true question, in all cases of this sort, is, (it has been said,) whether there has been a legitimate use of the copyright publication, in the fair exercise of a mental operation, deserving the character of a new work. If there has been, although it may be prejudicial to the original author, it is not an invasion of his legal rights. If there has not been, then it is treated as a mere colorable curtailment of the original work, and a fraudulent evasion of the copyright. But this is another mode of stating the difficulty, rather than a test, affording a clear criterion to discriminate between the cases."

Kent, in the second volume of his Commentaries, pages 381–2, says: "A mere colorable abridgment of a book is an evasion of the statute, and will be restrained; but, as Lord Hardwicke observed, this will not apply to a real and fair abridgment; for an abridgment may, with great propriety, be called a new book. It is very often extremely useful, and displays equally the invention, learning, and judgment of the author. * * * A person cannot, under the pretence of quotation, publish either the whole, or any

material part of another's work; but he may use, what is in all cases very difficult to define, fair quotation. A man may adopt part of the work of another. The *quo animo* is the inquiry in these cases. The question is, whether it be a legitimate use of another's publication, in the exercise of a mental operation, deserving the character of an original work."

Godson, in his work on Patents and Copyrights, page 344, after laying down the same doctrine, in nearly the same words, adds: "Many valuable works are so voluminous, that abridgments of them are extremely useful. To make them, some judgment must be exercised, and some labor employed; and therefore the authors of them ought certainly to be encouraged. In general, an abridgment tends to the advantage of the author, if the composition be good, and may serve the end of an advertisement."

Maugham, in his work on Literary Property, pages 129–130, after laying down the same general doctrine, adds: "The grounds of the decisions on this important subject, as reported in the law books, are not altogether consistent in principle."

These text-writers, Story and Kent, American, and Godson and Maugham, English, cite nearly the same authorities, which I now proceed to examine without regard to their chronological order.

Bell v. *Walker*, 1 *Brown C. R.* 451, *decided in* 1785. This was a bill to restrain the publication of "Memoirs of Mrs. Bellamy," a small work, which sold for 2*s.* 6*d.*, as a piracy from a larger work in five volumes, which sold for 15*s.* Passages were read from each, to show that the facts and even the terms used were often the same verbatim. The Master of the Rolls said: "If this is a fair *bona fide* abridgment of the larger work, several cases in this Court had decided that an injunction should not be granted. It had been so determined in Dr. Hawkesworth's Voyages. He should not at present decide whether it was such, or a piracy from the former; but he had heard sufficient read to entitle the plaintiff to an injunction until answer and further order."

It will be observed that this case does not decide what a fair abridgment is, nor what may be abridged. The work here was not of a scientific, but a narrative character; and no question was made as to plan and arrangement of the materials, but only as to identity of language.

Straham v. *Newberry*, *reported as anonymous*, *Loffl*, 774. This is the case of "Dr. Hawkesworth's Voyages," referred to in *Bell* v. *Walker*, and is believed to be the only case which attempts to lay down a rule for determining what is an abridgment. Lord Apsley said: "To constitute a true and proper abridgment of a work, *the whole*

must be preserved in its sense, and then the act of abridgment is an act of the understanding, employed in carrying a large work into a smaller compass, and rendering it less expensive, and more convenient both to the time and use of the reader, which makes an abridgment in the nature of a new and meritorious work." * * "An abridgment, where the understanding is employed in retrenching uninteresting and unnecessary circumstances, *which rather deaden the narrative*, is not an act of plagiarism upon the original work, nor against any property of the author in it, but an allowable and meritorious work."

It is to be observed that this rule is expressly laid down for a narrative, and could not apply to a scientific work, which is, from its very nature, incapable of being reduced in "compass," and yet the "whole be preserved in its sense." For the rest, Lord Apsley's idea of an abridgment agrees very nearly with that of Locke, that it must be "the whole in little."

Giles v. *Wilcox*, 2 *Atk.* 141, *decided in* 1740. This was a bill to restrain the publication of a book, entitled "Modern Crown Law," as a piracy from "Hale's Pleas of the Crown." The only difference was stated in the bill to be, that some old repealed statutes were left out, and the Latin and French quotations translated. Lord Hardwicke said: "Where books are colorably shortened only, they are undoubtedly within the meaning of the act of Parliament, and are a mere evasion of the statute, and cannot be called an abridgment. But this must not be carried so far as to restrain persons from making a real and fair abridgment; for abridgments may with great propriety be called a new book, because, not only the paper and print, but the invention, learning, and judgment of the author are shown in them, and in many cases are extremely useful, though in some instances prejudicial, by mistaking and curtailing the sense of an author." An injunction was granted against this "extremely illiberal publication:" and in *Tonson* v. *Walker*, 3 *Swanston* 678, it is said that this case was referred to arbitrators, who found the work complained of to contain about one eighth of Hale, and to be a fair abridgment.

This is the only case where the question related to a scientific work; and it will be observed that the decision was finally made by arbitrators. So far as the great Chancellor intimated an opinion, it was against this abridgment, though he did recognize the general doctrine of the legality of fair abridgments. In this case reference was made to that of *Read* v. *Hodges*, which was a bill to restrain the publication of an abridgment of Motley's Life of Peter the Great. The original was in three volumes, and the abridgment in one, which was verbatim the same with Motley's, as far as it went; but whole

passages were omitted to reduce the compass of the work. Lord H. regarded this as a more flagrant case than that of *Giles* v. *Wilcox.*

Butterworth v. *Robinson*, 5 *Ves.* 709, *decided in* 1800. This was a bill to restrain the publication of an "Abridgment of Cases, &c.," as being a piracy from the "Term Reports." The arguments of counsel were omitted, and the chronological order was changed to alphabetical, and the rest copied verbatim. The Chancellor examined a few of the cases, with which he was familiar, and granted an injunction.

This case, it may be observed, is very similar to that of *Wheaton* v. *Peters*, 8 *Peters* 591, where the "Condensed Reports" would have been treated as a piracy, if the opinions of the Court had not been decided to be public property.

Dodsley v. *Kinnersley*, *Amb.* 403, decided in 1761. Plaintiff was proprietor of Johnson's Rasselas. Defendant had printed about one tenth of it in a magazine, including the narrative only, and leaving out the moral reflections. Plaintiff had previously published equally long extracts from Rasselas in a newspaper, of which he was also proprietor. Sir Thomas Clarke, M. R, thought defendant had only made fair quotations, not more prejudicial than the extracts published by plaintiff; and at any rate, that the quality of an abridgment could not be inquired into. He also made this important remark, that "no certain line can be drawn to distinguish a fair abridgment; but every case must depend upon its own circumstances."

But this was really the case of a review, and not of an abridgment, in any proper sense of the word; and the decision goes no further than to recognize the right of fair quotation.

Lewis v. *Fullarton*, 2 *Beav.* 6, decided in 1839. Plaintiff was publisher of a *Topographical Dictionary*, consisting partly of compiled and partly of original matter. Defendant published a *Gazetteer*, containing, with much original matter, a large portion of plaintiff's work. The Master of the Rolls made a personal inspection, assisted by the exhibits, and said: "It appearing to me, under these circumstances, that if the parts affected with the character of piracy were taken away, there would be left—I cannot say nothing but a few broken sentences—but there would be left an imperfect work, which would not, to any useful extent, serve as a Gazetteer, I think I ought to grant an injunction to restrain the publication of the parts which are pirated, without waiting till all the parts which have been pirated can be distinctly specified."

Here, it will be observed, was no question of abridgment, the works not being of a rival character. It was a case of downright piracy, without even the pretext of an abridgment. But I appre-

hend that the test here proposed would be fatal to all abridgments. For what would be left in any abridgment if you take away that which is taken from the work abridged.

Campbell v. *Scott*, 11 *Simons* 31. Defendant published a volume of poems of 790 pages, of which 34 consisted of an original disquisition, and the residue of selections from various modern poets, and among them some of the poems of the plaintiff, without note or comment. And it was held that this could not be allowed, either on the principle of quotation or abridgment; and although plaintiff's poems formed but a small part of the book, a perpetual injunction was granted with respect to them.

Here however was, in reality, no question of abridgment, in the proper sense of the word; for the poems taken were taken in the whole. Besides, how can a poem be abridged? The thing is impossible.

Bramwell v. *Halcomb*, 3 *Mylne & Craig* 737. Plaintiff was author of a treatise upon the manner of proceeding on bills in the House of Commons, and defendant, of a treatise on private bills in both Houses, which was alleged to contain numerous passages from plaintiff's book. Lord Cottenham said,—"When it comes to a question of quantity, it must be very vague. One writer might take all the *vital part* of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity, but value that is always looked to."

This, however, was not the case of an abridgment, but simple piracy.

Wilkins v. *Aikin*, 17 *Vesey* 422. Plaintiff was author of a work on Grecian Antiquities, containing 74 pages, and defendant, of a work on Architecture, consisting of 23 pages, alleged to contain passages and prints copied from plaintiff's work, amounting to three pages; Lord Eldon said: "There is no doubt that a man cannot, under the pretence of quotation, publish either the whole or part of another's work; though he may use, what it is in all cases difficult to define, fair quotation." "The question upon the whole is, whether this is a legitimate use of the plaintiff's publication, in the fair exercise of a mental operation, deserving the character of an original work."

This was not a case of abridgment, although the criterion here proposed has been adopted by the text writers as applicable to abridgments. But it seems to involve a contradiction in terms; for how can any abridgment deserve the character of an original work? As between two abridgments, one may be an original abridgment and the other not; but neither can be called an original work, without confounding a very plain distinction.

Roworth v. *Wilkes*, 1 *Camp.* 98. Plaintiff was proprietor of a work on *Fencing*, consisting of 118 pages, of which defendant copied 75 into his *Encyclopedia*. Lord Ellenborough said: "A review will not, in general, serve as a substitute for the book reviewed; and even there, if so much be extracted that it communicates the same knowledge with the original work, it is an actionable violation of literary property. The intention to pirate is not necessary in an action of this sort."

This was a clear case of piracy without the pretence of abridgment; but the test of fair quotation here given, that of communicating "the same knowledge" as the original work—must certainly be fatal to all faithful abridgments.

Matthewson v. *Stockdale*, 12 *Vesey* 270. This was the case of a "servile copy" of an East India Dictionary, even to the errors and mistakes. The only question was, whether such a work could be the subject of copyright; for if so the piracy was complete. Held that it could, and a perpetual injunction granted.

Barfield v. *Nicholson*, 2 *Simons & Stewart* 1. This was the case of a *Practical Builder*, alleged to be a piracy from an *Architectural Dictionary*, though the arrangement was entirely different. Sir John Leach, M. R., thought that there was no originality in the matter, and therefore no piracy. But on appeal, the Chancellor thought, otherwise, and granted an injunction.

I have thus reviewed all the English cases usually cited by the text writers, as determining the legality of fair abridgments. And it will be perceived that only two or three of them at all presented the question for decision. In fact, they leave the whole subject in the greatest degree of uncertainty. They do not discriminate between quotation and abridgment; they do not determine what works may be abridged; and they furnish no practicable test for ascertaining what is a fair abridgment. Many of them, moreover, contain expressions which go strongly against all abridgments. In the meantime there are no American decisions directly upon the point, although there are *dicta*, as we shall see, corresponding with the opinions of the text writers above quoted.

V. But whatever may be the law as to abridgments generally, there is one class of works to which it cannot apply without a direct conflict with what has been decided in the United States. I refer to those treatises upon scientific subjects, where the materials are all common property, and not the subject of copyright; but where the whole originality consists in the plan, arrangement and combination of the materials. Such works, it is now well settled, may be the subject of copyright, and from their very nature

they are incapable of being abridged in that which is the basis of copyright in them, namely, their plan, arrangement and combination of materials. You may abridge the materials, but you cannot abridge the plan, combination and arrangement, without destroying them altogether. They form an irreducible unit or whole; and, as in the case of combination under the Patent law, the identity is gone the moment a single element in the combination is changed. Let us then review the cases in which this doctrine of copyright in plan, combination and arrangement of materials is settled.

Gray v. *Russell*, 1 *Story* 11. Gould had prepared an edition of Adam's Latin Grammar, with notes compiled from various authors, but none of them original. Cleveland published another edition of the same work, with the same notes, using the same plan and arrangement as Gould. The Court granted an injunction. Judge Story said: "The preparation and collection of these notes from their various sources, must have been a work of no small labor and intellectual exertion. The plan, the arrangement and the combination of these notes in the form in which they are collectively exhibited in Gould's Grammar, belong exclusively to this gentleman. He is then justly to be deemed the author of them in their actual form and combination, and entitled to a copyright accordingly." "Although the doctrine is often laid down in the books, that an *abridgment* is not a piracy of the original copyright, yet this proposition must be received with many qualifications. In many cases the question may naturally turn upon the point, not so much of the *quantity*, as of the value of the selected materials. As was significantly said on another occasion—*non numerantur, ponderantur.* The *quintessence* of a work may be piratically extracted, so as to leave a mere *caput mortuum*, by the selection of all the important passages in a comparatively moderate space."

Folsom v. *Marsh*, 2 *Story* 100. Plaintiff was proprieter of Sparks' Life of Washington, in 12 volumes, making over 6,000 pages, the first volume only being original matter, and the rest the writings of Washington. Defendant published Upham's Life of Washington, in 2 volumes, containing over 800 pages, of which 353 pages were taken from plaintiff's work, and 317 of these consisted of writings of Washington, for the first time published by plaintiff, under a contract with Washington's representatives. A perpetual injunction was granted as to these before unpublished writings. Judge Story laid down this rule: "It is clear that a mere selection, or different arrangement of parts of the original work, so as to bring the work within a smaller compass, will not be held to be a *bona fide abridgment.*" "It is certainly not necessary to constitute an invasion of copyright, that the whole of a work should be copied, or even a large portion of it, either in form or in substance. *If*

so much is taken that the value of the original is sensibly diminished, or the labors of the original author are substantially, to an injurious extent, appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto." "Neither does it necessarily depend upon the quantity taken, whether it is an infringement of the copyright or not. It is often affected by other considerations, the value of the materials taken, and the importance of it to the sale of the original work."

Emerson v. *Davies*, 3 *Story* 768. Plaintiff was author of an elementary work on Arithmetic, consisting of 48 pages, not claiming originality in any of the materials, but in "the plan, in the arrangement of the tables, the form of the lessons, the illustration of the examples by unit marks, and the gradation of lessons." Defendant was author of a similar work. In his answer he alleged that the materials of both were common, and denied that he had copied from the plaintiff in any of the above named particulars. The Court was satisfied that he had, in some of them at least, as nearly half his book was almost identical with the other. Judge Story, in one of the last and most elaborate opinions he ever delivered, after reviewing all the authorities, affirmed the doctrines of the two preceding cases. I quote several passages: "What are all modern law books but new combinations and arrangements of old materials, in which the skill and judgment of the author in the selection, and explanation, and accurate use of those materials constitute the basis of his reputation, as well as of his copyright. Blackstone's Commentaries and Kent's Commentaries are but splendid examples of the merit and value of such achievements." "In truth, every author of a work has a copyright in the plan, arrangement and combination of his materials, and in his mode of illustrating the subject, if it be new and original in its substance." "No person has a right to borrow the same plan, and arrangement, and illustrations, and *servilely to copy them* into any other work." "It may be laid down as the clear result of the authorities in cases of this nature, that *the true test of piracy or not, is to ascertain whether the defendant has, in fact, used the plan, arrangements and illustrations of the plaintiff, as the model of his own book*, with colorable alterations and variations only to disguise the use thereof; or whether his book is the result of his own labor, skill, and use of common materials, and common sources of knowledge open to all men, and the resemblances are either accidental, or arising from the nature of the subject." "It may be true, that taking the entire volume, the other parts may not be executed upon the same plan as the plaintiff's. But then if it substantially include the essential parts of the plaintiff's plan, of his arrangement, examples and tables, so as to supersede the work of the plaintiff, it is a violation of his copyright." "I am unable to divest myself of the impression, that in point of fact, the defendant *had before him*, when he composed his own work, the work of the plaintiff, and that he made it his model, and imitated it closely." "Nor do I mean to

suggest that the defendant has not acted with entire good faith; although I cannot but think he has acted under a mistake of the law."

Webb v. *Powers*, 10 *Law Reporter* 152. Plaintiffs were proprietors of "Flora's Interpreter." Defendants of the "Flower Vase," which copied 20 definitions out of 148, consisting of 156 words only. The poetry of defendants was original, that of Plaintiffs selected. Very little of the plaintiff's plan was original, and even that was not all copied by defendants, though some of it was. Held per Woodbury J., that this was not a case for injunction, though it might be for an action at Law. The quantity of pirated matter was too small to justify an interference with the whole book. It was not a question of abridgment, but simple piracy.

These are believed to be all the American cases bearing upon the subject: and, while they seem to take for granted the right to make a fair abridgment in certain cases, in neither of them was this question directly presented. At the same time they do settle a principle which is directly in conflict with the right to abridge scientific treatises, so far as plan, combination, and arrangement of materials are concerned.

But if literary property is to be protected, and authorship of the highest kind encouraged, either the Legislature or the Courts must go further. The right to abridge any work, by any person other than the author, must be wholly taken away. Let me refer for illustration to a splendid example: I mean the works of Mr. Justice Story; which, while they have given to American jurisprudence the highest name throughout the world, and to their author everlasting renown, have, at the same time, enabled him to leave a magnificent legacy in copyrights to his family—provided the law shall protect them from piracy under the name of abridgments. But let it once be understood that they may be abridged with impunity—and from the very nature of their subjects, and the wonderful copiousness of illustration with which they abound, they are peculiarly susceptible of abridgment—and how would the pecuniary value of this legacy be diminished. The ever-living fame of these works no abridgment can touch: but the property in the copyrights—that fair reward for a life of labor, never perhaps surpassed—may be essentially reduced in value, if not wholly destroyed. Now ought this so to be? Did Judge Story, or does any great author, according to the rant of Lord Camden, write for fame alone? If so, do away with copyright altogether. But, if authors and their families are to be sup-

ported from their works, by securing to them an actual and valuable property in their copyrights, do away with the right to abridge these works.

NOTE. There is a case now pending before the Circuit Court of the United States, for the District of Ohio—*Story's Executors* v. *Holcombe and others*—which will raise for decision the precise point last made above. Mr. Holcombe's book is entitled "An Introduction to Equity Jurisprudence, on the Basis of Story's Commentaries;" and in the preface it is stated to be "substantially an abridgment of that work." It has the same number of chapters, with the same titles. In short, it contains the quintessence of Story's Commentaries on Equity Jurisprudence, in a much smaller compass. Perhaps no case could more fairly present the whole doctrine of abridgments for discussion and decision. And, from the quotations before made from Judge Story, it will be seen that it may perhaps have been vouchsafed to him, during his life, to establish such principles in the law of copyright, as shall effectually protect the rich inheritance therein, which he had laid up for his children.

P. S. Since the above was in type, the case above referred to has been decided by Judge McLean, who has kindly furnished us with his very learned and elaborate opinion. We regret that it is too late for this number; but it will appear in our next. He is opposed to abridgments on principle, but thinks them warranted by the authorities. In the first third of Mr. Holcombe's book, he thinks too much use is made of Judge Story's language, and as to that, grants a perpetual injunction. W.

DECISIONS OF THE COURT IN BANK, 1846-7.

[BY W. M. CORRY.]

KING *v.* KING.

Concluded from Nov. number, page 80.

Third: That it is congenial to our institutions. It is so, because it facilitates instead of restraining alienations of real estate. (*a*)

The rule of Shelly's case was adopted in the time of Henry III, when the feudal system was in full vigor. Under that system, on the death of a tenant, and the succession of his heir, the lord was

entitled to a *relief*, and to the profits arising from the wardship and marriage of the heir; but on the transmission of an estate, by purchase, the lord was entitled to a fine for relief only. On the abolition of military tenures in England, the foundation of the rule was probably destroyed; but other great reasons for its retention remained, besides the consideration that it had become an established element of the law of real property throughout the country. These reasons are given in the leading case of modern times on the same question: *Perrin v. Blake*, Hargrave L. T. 489, by Justice Blackstone, (A. D., 1770.) He doubts whether the rule took its rise merely from feudal principles, and says he never met with a trace of any such suggestion in any feudal writer. He states that it was established mainly to prevent the inheritance from being in abeyance; *and in the second place, from a desire to facilitate the alienation of land.* He imputes its origin, growth and establishment on the aversion the common law had to the inheritance being in abeyance; and it was always held by the ancient law, to be in abeyance during the pendency of a contingent remainder in fee, or in tail. As to the other foundation for the rule, the desire to facilitate the alienation of land, he says it *was contrary to the genius of the feudal system*, and put land on the track of commerce one generation sooner by vesting the inheritance in the ancestor, and giving him the power of disposition. Mr. Hargrave (L. T. 551) thinks the great object of the rule was to preserve the marked distinction between a title by descent and by purchase, and to prevent the anomaly of a freehold with a perpetual succession to heirs without the other properties of inheritance. (*b*)

That Justice Blackstone is right in his proposition, that the rule does facilitate alienation, there can be no difference of opinion; and it is unpardonable to deny its adaptation to the circumstances of every free people. I feel that I should not be discharging my duty, if I did not press this point to a demonstration: and prove that the Shelly rule ought to be sought for, instead of shunned by our Courts. Real property being the very basis of the state, under every known form of government, the mode of its acquisition, descent and transfer has been universally made by lawgivers and Judges a great object of attention. The effort of princes has always been to concentrate it in the fewest estates; and studiously to clog its transmission from hand to hand. The pride and reliance of the great families in all aristocracies, martial, commercial and noble, whether founded on carnage, trade or lineage, have been placed upon some

law of entail, which should, if possible, secure to their descendants the inheritance of the house. Indeed it is of the essence of the feudal system itself: and far more important to its support than the fees of the seigniory consequent upon the descent of the land to the heir. In republics wisely administered, on the other hand, care is always taken at the beginning to distribute the realty in such a manner, that, if possible, every citizen may become a freeholder; and changes of property should be constantly promoted. This is the only administration of law consistent with the genius of good government; and nothing so effectually crushes the very foundation of popular institutions, as to place in the way of the rise of merit, a land privilege from generation to generation. While the right of property should be respected, and the transfer assisted, by no means ought the force of law to be invoked in a republic, to preserve the inheritance from its natural devolution in favor of those who deserve by superior capacity to acquire and enjoy it. The opposite philosophy enables the worthless to oppress the good, and the idle to appropriate what should be won by the exertions of the wise and diligent. So directly is this state of things adverse to freedom, that France struck first at her entails when she overthrew her tyrants; and the leaders of our own memorable struggle with the mother country, aimed to prostrate the same system as soon as they achieved independence. Jefferson, the 'civil chief' of the Revolution, led the leaders.

It could not be otherwise than that such should have been the uniform policy of all the real property law ever in force in Ohio, prior to 1840, when our present Wills act violated true principle, and went back to bad examples in regard to devises of real estate. The ordinance of 1787, for the government of the N. W. Territory, facilitated the acquisition of land, and made its transfer, by purchase and descent, equitable and uninterrupted. The Federal land law of 1800, and all others in amplification of it up to 1820, during which period emigration was at its flood, made the then public domain accessible to all, on wise and liberal terms. Through a process at once easy and simple, freeholds could be secured by all the citizens. And the credit system, then first introduced, led each in the way of economy, prudence and industry. Our State laws have sought to make land titles freely transmissible, and have forbidden them, ever since 1812, from being entailed beyond the issue of the first donee in tail. The same liberal policy, therefore, has prevailed alike under the State and Federal Constitutions. But the Legislature of

Ohio, after she entered the Union, with the exception mentioned, and Congress before that period as well as since, have been pursuing, it seems, a bad policy. And it is now discovered, and gravely inculcated, that the government of a republic should lean towards the example of adverse systems. Hereafter the Court in Bank are to resolve doubts in favor of restricting the title to real estate, instead of facilitating its transit. And in order to make a good beginning, the Judges present to the public eye a spectacle grown so common in judicial and political annals as to excite no surprise; I mean that emulation of the worst act of the father of Olympus, which blinds men in office to the enormity of consuming their own offspring.

Fourth: The Shelly rule is applicable to the case according to the reasoning and authorities which are reliable, as the will actually reads.

The reader is requested, for the proof of this proposition, to consult the decision of the Court by C. J. Lane in 12 O. R. 470. It fully establishes it in the shortest compass of argument, and by quotation of a few authorities only; and at the same time, confutes every plausible objection. I regard the opinion as one of the best in that volume of reports, and quite worthy of its place by the side of that in *Adams' Lessee v. Jeffries*, 12 O. R. 253, another masterly judgment by the same hand. Both are artistical and sound expositions of abstruse, but fundamental real property law. One of them, we have seen, has been overthrown; and it remains to be seen hereafter, whether any conceivable discrimination can save the other from the sweep of the later decision in the case of *Robb v. Irwin*, in the 15 *O. R.* 689, from which every man must recoil who has a love for law, or sense of justice, or even the instinct of property.

I have stated, in the early part of this paper, an objection to the opinion of C. J. Lane, which the order of the discussion now brings me to consider. It will be examined as thoroughly as my space allows, because, though in itself immaterial according to the canons of interpretation pertinent to this controversy, it has been used by the Court in Bank to reverse the rule of right applicable to the case.

Fifth: That not even the interpolation of 'children' for 'heirs,' in the devise to C. King, will take the case away from the grasp of the rule, according to the law of descent in Ohio, although it would be otherwise of England.

I open this head of inquiry, by speaking of the difference in the phraseology of deeds and wills.

In a deed, the word "heirs" is necessary to create a transmissible estate, although the words "of the body" are not necessary to create an estate tail; words of the same meaning being sufficient.

In a will, any words which designate the heirs of the body of the tenant for life, as the parties to take a remainder in fee or in tail, create an estate tail, whether these words be "issue," "sons," "children," &c.

"Issue" is construed, in England, to mean *hereditable issue*; and and there "children" will be construed to mean "issue," if assisted by a strong context, or absolutely necessary to save the devise. This condition of the construction is required because, in England, *the eldest son* is "the heir," or "hereditable issue," but the "children" are not, nor are the "sons." Whenever therefore there is no extraordinary exigency, these words are held to be words of purchase and not of limitation. And hence *Goodright* v. *Dunham*, Doug. 265, the case relied on by C. J. Lane, which was a devise to A., and after his death, to all *his children equally*, and their heirs, was correctly decided. For the children of A. could not take, under the law of primogeniture as *heirs of A.*, and consequently the remainder to them could not coalesce with the life estate of their parent, under the rule in Shelly's case, so as to give him an estate tail.

But it is perfectly evident that this authority and the reasoning which supports it, are altogether inapplicable here. Indeed, that they point out the very opposite construction of the same words as the true construction in this State.

In Ohio, the law of primogeniture is fortunately unknown; and all a man's children are *his heirs;* so that no violence is done to the words "children" in construing them to be equivalent to "issue," which is, in England, held to be, as before said, hereditable issue—the synonyme of "heirs." And therefore it irresistibly follows, that allowing the words "children" to be interpolated, or construing "heirs" to be the precise equivalent of "children;" granting, in short, the utmost the Court have assumed in their judgment, that judgment is erroneous. The words cannot be made words of purchase in any aspect; for even if the word "children" without more in a will be only equivalent to "heirs of the body," that is sufficient to make them take by limitation. All the rule in Shelly's case requires is, that the remainder man shall take as heir an inheritable estate; whether in fee or in tail is not material. Having used the words in either case which stand for the ordinary line of succession, the general intention that they shall be words of limitation subordinates

the secondary intention, that they are words of purchase. This rule of construing devises is so inflexible, that even a direct declaration that the first taker should take for life only, and that the persons who shall answer the description of his heirs shall take as purchasers, will be inoperative. If the terms used in the will comprehend the whole class of heirs of the body, and they become entitled, on the death of the ancestor, to the estate, in the same manner, and to the same extent, and with the same descendible qualities as if the devise had been simply to A. and the heirs of his body, in fee or in tail, then the words used are words of limitation, and the presumed general intention will control the legal sense of the words. See 4 *Kent Com.* 222; and the remarks of Mr. Hargrave cited on page 222. When the testator does not intend to break in upon, and disturb the line of descent from the ancestor, but uses the word heirs (or any other word) as *nomen collectivum* for the whole line of inheritable blood, the heirs must take as heirs, and not as purchasers. See 2 *Preston on Est.* 326–7. "If the testator intended that the first taker should only take an estate for life, and that his issue should take as purchasers, yet if he intended that the estate should descend in the line of hereditary succession, the general intent prevails, and the word issue is a word of limitation." 4 *Kent Com.* 228.

If any confirmation of this result were wanting, we have it, as before observed, in the English decisions establishing the opposite construction, under their law of descent to the first born son. The reasoning is the same, but the facts are adverse; and it will perhaps make more manifest the error we are chastising, to state some elements of the difference, even at the hazard of a little repetition.

At common law, under an English devise to A. and his children, A. could not take an estate tail if he had no child at the time of the devise, *Wild's case* 6, *Rep.* 7. The reason of this rule is, that "the intent of the devisor is manifest and certain that the children (or issue) should take, and as immediate devisees they cannot take, because they are not *in rerum naturae*, and by way of remainder they cannot take, for that was not his (the devisor's) intent, for the gift is immediate, therefore such words must be taken as words of limitation." But in a devise to A., and after his death to his children, A. takes only a life estate. See 2 Hil. Ab. p. 31, §57 to 61 and citations, including the case in Douglass 265, relied on by C. J. Lane inadvertently, without considering the difference between the English

and the Ohio laws of descent. Yet even the rigorous law of primogeniture is frequently evaded to give effect to the equitable rule of Shelly's case, in England, by their jurists, at the same time that ours are receding from that liberal ground, contrary to law, as well as equity. *Jarman on Wills* 73. "In a considerable class of cases, the word child, or children, has received an interpretation extending it beyond its more precise and obvious meaning, as denoting immediate offspring; and been considered to have been employed as *nomen collectivum*, or as synonymous with issue or descendants, in which general sense it has often the effect, when applied to real estate, of creating an estate tail."

If American authority be necessary to support the construction for which we contend, the following cases can be consulted, where it has been held that, by the words "issue," "sons," "children," &c., after devises for life, estates tail are created: *Roosevelt* v. *Thurman*, 1 *Johns. Ch. Rep.* 210; *Burnet* v. *Dennison*, 5; *Id.* 35, 4 *Mumf.* 328; 1 *Root* 79; *Ib.* 96; 9 *Mass.* 514; 2 *Yeates* 414; 17 *Serg. & R.* 441; 1 *Penn.* 219; *Id.* 819, 880; *and see the note A. to* 4 *Kent Com.* 232; 2 *Day.* 332; 1 *Bay.* 453; 15 *Pick.* 104; *I. S. & R.* 203; 5 *Call.* 439; 1 *Rand.* 194; 16 *S. & R.* 323; 3 *Rawle* 59; 5 *Rand.* 273; 1 *Wheat.* 139; 1 *Dal.* 47; 6 *Watts* 18; 2 *Har. & M'H.* 1, 100; 4 *Id.* 481; 2 *Har. & J.* 69.

Of all the various errors committed by the Courts of the several States, none seem to have been so far, certainly none farther, astray than this decision. It has, I admit, been held, elsewhere than in Ohio, that under devises to "issue," "children," &c., they have taken as purchasers. *Sisson* v. *Seabury*, 1 *Sum.* 235; *Morgan* v. *Morgan*, 5 *Day* 517; *Den.* v. *Schenck*, 3 *Halstead* 29; *Anderson* v. *Jackson*, 16 *John.* 382; 2 *Cow.* 333; *Jackson* v. *Chew*, 12 *Wheat.* 152; 1 *Conn.* 36; 1 *Bre.* 40; *Dunwoodie* v. *Reed*, 3 *S. & R.* 435; *Carson* v. *Jeanneritt* 2 *M'Cord* 66, 75; *Nash* v. *Butler*, 16 *Pick.* 49; *Harman* v. *Osborne*, 4 *Paige* 336; *Findlay* v. *Riddle*, 3 *Bin.* 139; *M'Comb* v. *Miller*, 9 *Paige* 265; *S. C.* 26 *Wend.* 229; But some of these cases are upon executory devises: in others, the remainder differed in quality from the particular estate.

The contrary error has also been committed in other American cases, of construing the word "heirs" to mean the old common law heirs, under the law of primogeniture. Mr. Hilliard, in his Ab. 1 vol. 35, §29, says the people of Massachusetts, *at a very early period* of the country, adopted the idea of entailment, *even to the extent* of giving an estate limited to one, and the heirs of his body to the eld-

est son in the first instance, and to the other sons only on failure of his issue." But this seems to have continued at a later period, when the eldest son was not the sole heir, and therefore did not answer the description in the limitation. See *Davis* v. *Hayden* 9 *Mass.* 514, and the note of Mr. Rand, the editor. The heirs meant by the limitation are those upon whom the State law rests the descent.

Another error is sometimes presented, for it seems to have been supposed in other American cases, that if the limitation to the heirs of the body be followed by words making such heirs tenants in fee, they take as purchasers. But that is not so. The rule in Shelly's case merely requires the remainder man to take as heir an inheritable estate and it is immaterial whether it be in fee or in tail. *Goodwright* v. *Pullan*, 2 *Ld. Ray* 1437; 2 *Str.* 729; *Morris* v. *Ward*, 8 *T. R.* 518; 5 *T. R.* 304; 2 *Bur.* 1102; 2 *Atk.* 249; *Wright* v. *Pearson*, 1 *Eden.* 119; *Ambler* 358; *Measure* v. *Gee*: 5 *B. & A.* 910; *Denn* v. *Shenton*, *Cowp.* 410.

Even Ch. Kent, accurate as he is generally, in 4 *Com.* 216, (5*th ed.*) confines the rule to cases where the limitation gives the legal, and not the mere trust or equitable title. But this is afterwards corrected on *pp.* 219–20. He also fails in his criticism endeavoring to show the discrepancy between the premises and the conclusion of J. Blackstone's splendid argument in *Perrin* v. *Blake*, *pp.* 225–6, *idem.*, by quoting the Judge's own language in refutation, on p. 228. And he obviously misunderstands our Ohio statute of entails. (*See note* (*b*) *post.*)

Notwithstanding all these and similar mistakes to be found in the tribunals of a country so extensive as to furnish precedents on every side of every question, there was ample verge for the Supreme Court of this State to take conspicuous rank for misconceptions and alterations of the law. The learned Judge who was put forward to decide this case has culminated upon his error about the nature and applicability of the Shelly rule in Ohio, the egregious impropriety of adopting a construction of legal principles only applicable to that misgoverned region, where society withers under the law of primogeniture,

"Pelion on Ossa piled."

It is impossible to explain the influence through which he took upon him the initiative of such a stride in the wrong direction, and superadded the responsibility of overturning one of the best reasoned opinions in our reports. I attribute it to the precipita-

tion and other attendant evils of our practice in Bank. In taking leave of this protracted discussion, I feel bound to say that I have now examined every important judgment pronounced by the author of the opinion in hand, at the session last reported, which is erroneous. I shall soon award him due praise for his manly, and logical, and learned expositions of principle against the majority, imperishably recorded in this volume, for the admiration of the profession and his successors.

(*a*) Since the date of the New York revision of the statute law, in which the Shelly rule was lately abolished, and which bad precedent we have followed in Ohio with regard to wills of real estate, there have been several decisions on wills previously made, wherein the rule was not only recognized, but strictly applied and enforced. *Kingsland* v. *Rapelye*, *V. C.*, New York city, 1838; *Schoonmaker* v. *Sheely*, Second Circuit, N. Y., 1841; 3*d Edward Ch. Rep.* 1. And in a late case in Tennessee, *Polk* v. *Faris*, 9 *Yerg.* 209, after a profound and animated discussion before the Supreme Court, it was declared by Judge Reese to be a settled principle of the common law; and that whatever might have been the original policy of the rule, it was, as a rule of property, not inconsistent with the genius of our institutions, or with the liberal and commercial spirit of the age. It checked the disposition to lock up property, and render it inalienable. The rule was considered as equally applicable to deeds and wills of personal property, and on the acknowledged principle, that where the words would create an estate tail in real property, they would vest the entire and absolute property in chattels: See 4 *Kent Com.* (*5th ed.*) 229, 232.

In modern times, the point most frequently litigated has been the effect of repugnant or inconsistent words collected with "heirs of the body," or "issue," as where heirs were to take as tenants in common. All these cases show the true nature of the rule to be as stated. If the remainder be limited in such a manner that the heirs of the body of the first taker, will have an inheritance as they would have if the limitation had been *to* the ancestor and the heirs of his body, it matters not what words may have been employed, the rule in Shelly's case applies. 5 *Bac. Ab.* 31. And see Mr Sumner's note to *Wright* v. *Leigh*, 15 *Ves.* 568.

(*b*) Mr. Preston on Est. 307–0, denies these explanations by Justice Blackstone to be correct. He asks how, except between lord and tenant, and in regard to the fruits of the seigniory, could there have arisen any difference whether the inheritance was vested, or in abeyance? The doctrine that contingent interests of freehold must and that they shall be void, unless they become vested before the determination of such particular estate, or "*eo instanti*" in which they determine, had amply provided for the inconvenience which might otherwise have arisen to strangers, or even to the lords themselves, except in regard to the fruits of seigniory. As for the second reason advanced by Mr. Blackstone, it is supposed to have been in England disproved by the provisions of the statute, 'De Donis' passed about this time, [reign of Edw. I., who succeeded Hen. III.] and the fetters imposed on the alienation of estates. Besides the reason would be insufficient in its application to the words "heirs of the body," since estates tail could not be barred till the time of Edw. IV. But however the matter may stand under the common law of real property, taken as a system, at the origin of the rule and since, it is very certain that Blackstone's second reason is in force in this State, for the statute '*De Donis*' never prevailed here at any period.

It may be worthy of a short excursion, to show that the statute 'De Donis' was never in force in Ohio. Our Courts only recognize the common law, and the statutes in aid thereof, so far as they are suited to the condition of the people, and the genius of our institutions. [*O. R. passim.*] Here the statute of *uses* was rejected, 7 *O. R.* 275. Ch. Kent says that this statute 'De Donis' never was in force in South Carolina. 4 Com. 17. In *Miller v. Mathews* 2 Bay 397, it was held that the statute 13, Edw. I., creating perpetuities by estates tail, is not in force in this country, and consequently what would make an estate tail in England, is a conditional fee in South Carolina, which is alienable on the donees having lawful issue. It seems to me that the S. C.

doctrine will be adopted in Ohio, as the statute *De Donis* was never applicable to the condition of the people in the N. W. Territory. Our statute of entails [*Swan* 319] does not purport to affect the estate of the tenant in tail. It was probably the object of the Legislature to subject entailed land to sale on execution, and to the power of devising. They did not provide that there should be no dower or courtesy in such an estate; nor that it should not be extinguished before it leaves the first donee; *but they have merely provided that the entailment shall cease when the estate reaches the issue of the first donee in tail.* "The statute prescribes the manner of holding, not the rule of transmitting lands." *C. J. Lane*, 12 *O. R.* 437.

It is true that Chancellor Kent, in his Commentaries, 4 *vol.* 16, note, says "that in Vermont, *Ohio*, Illinois and Missouri, if an estate tail be created, the first donee takes *a life estate*, and a fee simple vests in the heirs, or persons having the remainder after the life estate of the grantee, or first donee in tail." "The tenant in tail in these States is in reality but a tenant for life, without the power to do any act to defeat or encumber the estate in the hands of the heir, or person in remainder." No authorities are cited. The Chancellor misunderstands the operation of the Ohio statute. It does not reduce the quality of a tenancy in tail; it merely destroys the entailment when the estate reaches the issue of the first tenant in tail. The object was not to fetter the estate in the hands of the first tenant in tail, but to unfetter it altogether in the hands of his issue. See 4 *Kent Com.* 227. "The rule in Shelly's case, if applied to real property, enlarges the estate for life into an inheritance, and gives to the tenant for life the capacity of a tenant in fee, by which he can defeat the entail, or strict settlement intended by the party." By the common law, before the statute *De Donis*, a gift to a man and the heirs of his body, was a gift upon condition that it should revert to the donor if the donee had no heirs of his body, but if he had, it should then remain to the donee. It was therefore called a fee simple on condition that he had issue. If he had issue, the condition was performed, otherwise it was not, and the estate reverted. 2 *Black.* 110; 3 *Bacon Ab.* 359, where the estate is more fully explained.

As before said, it has been expressly held that the statute of Uses (27 *Hen.* VIII.) was never in force in Ohio (*Helfenstein's lessee* v. *Garrard*, 7 *O. R.* 275, part 1) on the ground that it was not adapted to our real property law, and circumstances. And it would seem that as fines and recoveries have never been in use in Ohio, the statute '*De Donis*' 13 *Edw.* I., *ch.* 1, restraining alienation by tenants in tail, was never adopted here. But if that statute were in force here, lands entailed before the passage of the entail act of 1811 were and are now inalienable in Ohio; and we have fettered inheritances which so long ago as the 12th year of Edw. IV. were utterly abolished in England, by the invention of fines; unless indeed we adopt the suggestion of the next paragraph.

Should the statute *De Donis* have always been in force in Ohio, I presume that a simple conveyance by the tenant in tail has the same effect as a fine or recovery. This would have been so in Jamaica. *Perrin* v. *Blake*, *Harg. L. T. et supra;* and also the opinions of Mansfield, Ryder, Booth and Filmer, all eminent for their knowledge of the English law of conveyances, as expressed on the will of William Williams, which was litigated in that case, 1 *Fearne on Rem.*, *Appendix* 1, 31. Indeed fines and recoveries have been for centuries, in England itself, mere assurances; and have been substituted by simple conveyances in many of the old States from which the original settlers of the N. W. Territory came. 3 *Serg. & R.* 435; *Dunwoodie* v. *Read*, *Gibson J. diss.*

It assists this reasoning to observe, that cases of testamentary dispositions are frequent in Ohio, where estates are tied up for long periods. I have been recently consulted upon the will of Thomas Williams, who died fifteen years ago, devising an estate tail in a great city property, partly unimproved. That time has elapsed, and another generation must pass away before real estate in Cincinnati can be applied to the only purpose for which it is suitable—building—unless the estates of the heirs of the bodies of testator's daughters be coupled with those of their ancestors, under the wholesome rule established in Shelly's case. If they are mere tenants for life, they cannot make leases to their children; nor will they be entitled to be paid for improvements.

AMERICAN LAW BOOKS. STORY ON SALES.

[The following article is from the pen of an able lawyer of this city. Those who have the work referred to can judge of the accuracy of the review. Mr. Story's work on Sales has, on more than one occasion, received a commendatory notice from us, and it may not be improper to say, that, in the opinion of one of the Editors, the book is not entitled to unqualified praise.]

"A Treatise on the Law of Sales of Personal Property, with Illustrations from the Foreign Law. By William W. Story. Boston: Charles C. Little and James Brown. London: V. & R. Stevens and G. S. Norton, 26 Bell Yard, Lincoln's Inn. 1847."

In the preface to this work, after referring to the incompleteness of the English, and the want of any American treatise on the subject, it is said, that "a full and new treatise, which shall contain an exposition of the whole body of law relating to sales, as it now exists in America and England, and which shall elucidate and systematise the various conflicting authorities, and establish the rules of this branch of law upon the basis of principle, seems, therefore, to be greatly needed, both for the student and the practitioner." Towards this end, the efforts of the author, as he says, were directed; and from the introduction into the title page of English as well as American publishers, it would appear that the work was intended for use and circulation in both countries.

It may be a high and commendable object of ambition to an American writer to furnish the legal profession in England with a work on any subject, better adapted to their wants, and containing a more full and clear exposition of their law, than can be found in any treatise of an English author on the same subject; but it is doubtful whether a work, intended to accomplish such a purpose, and prepared with that view, would answer the purposes of an American lawyer as well as a work professedly American, and intended for home consumption. We have now more than seven hundred volumes of American Reports, and they are rapidly increasing. Few have access to them all, or even to the more important. On doubtful or difficult questions, it is important to have a more full statement of the decisions than can well be embraced in an ordinary digest. The reasons for such decisions, and the degree of consideration given in making them, it is also important to know. These wants, an American treatise on any branch of law ought to supply.

When a decision has been made in any of the leading American Courts, especially on a point of commercial law, there is a strong inclination in the other Courts to follow it; and if several concur in such decision, it is considered as almost settled law in the rest. For all admit, that it is highly important that there should be a uniformity of decision in the Courts of this country. Now it may, perhaps, be safely asserted, that nothing can tend more to accomplish this desirable object than American treatises on the different important branches of the law, which Judges and lawyers may consult as an accurate reference to such American decisions as it may be in their power to examine, and as containing a clear and full statement of any other important cases on the subject to which they may not have access.

The materials of a legal treatise, it has been said, "must essentially depend upon faithful abstracts from the Reports, and judicial treatises, with illustrations of their bearing." Now, when an American writer has a choice whether he shall abstract a principle and its illustration from an English or an American report, which should he select? If a legal principle is laid down and illustrated in a case reported among the decisions of the Supreme Court of the United States, or of one of the leading States of the Union, and also in a case decided in the Court of King's Bench or Common Pleas of of England, while all will admit that it would be highly proper in an American writer to quote both cases as an authority for the principle, yet in seeking an illustration of that principle, it would seem more proper to select the American case. It would seem, in short, that an American law book should, when practicable, be based on American authorities; that English decisions should be introduced as strengthening the American, when in accordance with them, and, of course, on points where there are no American authorities; and the points of difference between the English and American cases, and between the different American Courts, ought to be referred to and noticed.

But to return to the work of Mr. Story, which, as has been observed, was prepared with a view to its use in England as well as America. An American writer must find it a difficult task to furnish a work on such a subject, adapted to practical use in England. Many, doubtless, in the United States, have a good general knowledge of the present system of laws in England; but few have that accurate and minute acquaintance, that would seem necessary to justify such an undertaking and render it successful.

This difficulty may be illustrated by a reference to the work of Mr.

Story. In section 260, he considers what is meant by the phrase, in the seventeenth section of the statute of Frauds,—"no contract for the sale," &c.; and, as an illustration of the doctrine, that it does not embrace executory contracts for the future delivery of goods after they shall be manufactured, he says: "But, where the defendant ordered a chariot, which was not in existence, but was to be manufactured by the vendor, it was held, in an action for the value, that the contract was not within the statute of Frauds." Afterward, in section 270, he considers the necessity of stating in the memorandum, required by the same statute, the price agreed upon, as a portion of the bargain, and the exception, that if no price be agreed upon, the law will imply a reasonable price, and the memorandum will be sufficient, though no price be stated. "Thus, where the plaintiff ordered a chariot to be built by the defendant, and no definite price was agreed upon, nor expressed in the memorandum, it was held that the contract was binding, and that the plaintiff must be understood as agreeing to pay the reasonable value of the chariot; although, had a particular price been agreed upon, it should have been stated." Now an English student might consider it something strange that in the latter case a difficulty should be made in reference to the sufficiency of a memorandum of a contract, which according to the first case required no memorandum, not being within the statute. It would, therefore, be important for such a student to be informed, that by a statute passed between the period of the two decisions, (9 *Geo* 4, *c.* 14, *s.* 7,) such a contract was embraced within the provisions of the seventeenth section of the statute of Frauds, and that the latter case was decided with reference to the latter statute, which is still in force. This statute is not noticed by Mr. Story. It is one an English writer would scarcely have failed to notice, and, indeed, his failure to do so would be inexcusable.

A want of attention to the same statute has caused Mr. Story to introduce, once in a note, and afterwards in his text, the case of *Clayton* v. *Andrews*, 4 *Burr. R.* 2101, as still being authority. In section 260, he says, "so, also, where the defendant agreed to deliver a load and a half of wheat within three weeks or a month, the wheat being then unthreshed, the contract was held not to be such a contract of sale as was contemplated in the provisions of the statute," and refers to the case above cited. It is true, he adds to his reference: "But see *Garbut* v. *Watson*, 5 *Barr. & Ald.* 613." Now it would certainly have been better to have stated that *Garbut* v. *Watson* and *Smith* v. *Surman*, 9 *B. & C.* 561, are considered as having overruled *Clayton*

v. *Andrews;* and however that may be, the statute before noticed has put the whole matter to rest in England. As to the law in this country on the same subject, it is scarcely excusable in Mr. Story that he failed to notice the recent case of *Downs* v. *Ross*, 23 *Wend.* 270, in which a contract for the sale of *unthreshed wheat* to be delivered, after being threshed and cleaned, at a future time, was held to be within the statute of Frauds, and the case of *Clayton* v. *Andrews*, directly overruled. And there is still less excuse for the failure to cite three cases on the same subject, decided in his own State, *Mixer* v. *Howarth*, 21 *Pick.* 205, *Spencer* v. *Cone*, 1 *Metc.* 283, and *Gardner* v. *Joy*, 9 *Metc.* 177, in the last of which the rule is thus stated by Shaw, C. J.: "If it is a contract to sell and deliver goods, whether they are then completed or not, it is within the statute. But if it is a contract to make and deliver an article or quantity of goods, it is not within the statute." And in the conclusion of his opinion, *Garbert* v. *Watson*, which certainly cannot be reconciled with *Clayton* v. *Andrews*, is cited as the controlling authority on the subject.

In his commentary on that part of the statute of Frauds, which requires a memorandum in writing to be made of "any agreement, that is not to be performed within the space of one year," Mr. Story is equally or more unfortunate. In section 258, he says: "But a complete performance of the agreement within the year must be within the expectation of the parties, and be possible according to the terms of the contract, in order to take such a case out of the statute. And if the parties contemplate merely a partial performance within such time; or, if the terms of the contract manifest an intention not to complete it within such a time, the statute applies, and a memorandum in writing is requisite. Thus, where A agreed verbally with B, that in consideration that B would become his housekeeper, and take upon herself the care and management of his family, as long as it should please both parties, that he (A) would pay B wages at and after the rate of £6 a year, and that, by his last will and testament, he would "give and bequeath to the plaintiff (B) a legacy or annuity of £16 by the year, to be paid and payable to her yearly and for every year, from the day of the testator's death, for and during the term of her natural life;" it was held, that the agreement should have been made in writing"—citing *Fenton* v. *Emblers*, 3 *Burr. R.* 1281, *s. c.* 1 *W. Black.* 353. On looking into the report of the case of *Fenton* v. *Emblers*, it will be found that the decision was directly the reverse of what it is stated to have been by Mr. Story. The agree-

ment was held not to be within the statute of Frauds, and to require no memorandum in writing. After such a mistake in the case selected as an illustration of the principle laid down, it is not surprising that there should be an error in the principle itself. The idea that a complete performance of the agreement within a year, must be within the expectation of the parties, is not reconcileable with the authorities. It would seem to be sufficient to take the case out of the statute, if a complete performance within a year be possible. In the case of *Peters* v. *Westborough*, 19 *Pick.* 364, it was held, that a contract to support a person for a certain number of years is not within the statute; for if he die within one year, having been supported under the contract until his death, there will have been a complete performance. And yet such a complete performance could scarcely have been within the expectation of the parties. This case, which is not cited by Mr. Story, was decided on the authority of the same case of *Fenton* v. *Emblers*, referred to by him, a correct statement of which will be found in the opinion of the Court.

There is another subject in relation to which, it is conceived, that Mr. Story has fallen into an error; and, as it is one of considerable importance, it should be noticed. In section 199, after observing that the English rule of *market overt* is not generally enforced in the United States, he proceeds to state some exceptions, and after stating two, he says: "And third, in respect to judicial sales, to which the general rules of *market overt* apply." In a note to the same section, he says: "It is not, however, strictly true, that no market overt exists in this country—since sheriffs' sales, and sales made under the probate act of Vermont, upon writs of execution, and sales of goods found, and of estrays, and indeed all judicial sales are governed by the rules of market overt. See *The Monte Allegre*, 9 *Wheat. R.* 616; *Heacock* v. *Walker*, 1 *Tyler R.* 341; *Forsyth* v. *Ellis*, 4 *J. J. Marsh. R.* 298; *Samms* v. *Alexander*, 3 *Yates R.* 268."

The case of *Heacock* v. *Walker*, 1 *Tyler* 341, sustains Mr. Story as to "sales made under the Probate act of Vermont upon writs of execution, and sales of goods found, and of estrays;" but the remark in the same case, that they are "the only cases of sales which can with propriety be said to be made in *market overt* with us," should have induced a doubt as to the correctness of his idea, that sheriffs' sales, and generally all judicial sales, are governed by the rules of *market overt*. It is scarcely necessary to say, that the other cases cited by Mr. Story sustain no such proposition. Indeed, in looking into the facts of the case of *Forsyth* v. *Ellis*, 4 *J. J. Marsh.* 298, Mr.

Story must have seen, that the property had been sold at sheriff's sale, and recovered from the purchaser by the true owner, and the suit was by the purchaser against the sheriff to make him liable for the defect in the title of the defendant in the execution, and a doubt ought to have suggested itself, whether any such controversy could have arisen, if his idea that the rule of *market overt* applied to the sheriff's sale had been correct. The principle decided in that case, and also in the case of *The Monte Allegre*, was, that to all judicial sales the rule of *caveat emptor* applies.

It sometimes happens that the more plain a principle of law, the more difficult it is to find an authority to sustain it; never having been contested, it has never been directly decided. In a recent case, however, in the Supreme Court of Connecticut, *Williams* v. *Miller*, 16 *Conn. Rep.* 144, 147, it is said, "the defendant has, in his argument, assumed it, as an established principle, that a sale at the post by an officer, under color of process, divests an owner of his title to property, and conveys a good title to the purchaser, although the taking and sale are illegal. But we can sanction no such principle as this, unless we are satisfied that it is correct; and no attempt has been made to show that it is; but the defendant has assumed it, and argued from it as an acknowledged principle. Now there cannot, we think, be any difference in the law applicable to the levy of an execution on property exempt from such levy, and a levy on the property of a third person, not the execution debtor. We can discover no difference in the principle that should apply to the two cases. But will the broad ground be taken, that the levy of an execution upon a third person's property, and a sale of it by an officer, divests such third person of his title? Is it so, that because a trespass is committed by an officer, pursuant to the forms of law, therefore the property upon which it is committed is swept from the owner, and he turned over to seek his only remedy from the party taking it? May he not look to the property also, if he can find it?"

"The general rule is, that a man having no authority to sell, cannot, by making sale, transfer the property to another, that the vendee of a chattel cannot stand in any better condition than his vendor; and we are not aware of any exception to this rule, as is assumed by the defendant in this case. The only exception noticed in the *English* cases, is, where a sale is made in market overt. *Dyer* v. *Pearson*, 3 *B. & C.* 38, (10 *E. C. L.* 113;) *Peer* v. *Humphrey*, 2 *Ad. & Ell.* 495, (29 *E. C. L.* 158;) *Williams et al.* v. *Barton et al.*, 3 *Bing.* 139, (11 *E. C. L.* 70.") "We have not been referred to any authority

in support of the position assumed by the defendant; but we find, on the contrary, that Lord Mansfield, in *Cooper et al., Assignees of Johns* v. *Chitty*, 1 *Burr.* 32, considered it an admitted point that the innocent vendee of goods, wrongfully seized by the sheriff, could have no title under the sale, but that he is liable to an action. And in the case of *Balme et al.* v. *Hutton et al.*, 9 *Bing.* 471, (23 *E. C. L.* 338.) Tindal, C. J., says: 'Servants of the bankrupt, judgment creditors, who set the law in motion, *vendees at the sheriff's sale*, and all other persons who assist in selling, disposing, or removing the goods of a bankrupt, would confessedly be held guilty of a wrongful conversion."

It is scarcely necessary to observe, that this case escaped the notice of Mr. Story, and this leads to the remark that he has too frequently omitted to cite and refer to interesting and important American cases, some qualifying and others in direct conflict with the doctrines he has laid down. Several instances in addition to those already adverted to, may be noticed. In section 387, it is said, "when the vendor is neither a thief nor a finder, he can make a valid sale of goods to a *bona fide* purchaser, without notice, in cases where he has no title, if he be possessed of any legal type of title, which is negotiable—as, if he have a bill of lading, or a dock-warrant." Here should have been noticed the interesting case of *Salters* v. *Everett*, 20 *Wend.* 267; 15 *Wend.* 474—showing that this rule must be confined to cases where such type of title has been obtained by the voluntary act or consent of the owner; or, to use the language of Lord Ellenborough, where the owner "has given the external *indicia* of the right of disposing of his property." In the same section, and also in section 200, Mr. Story alludes to a distinction which has been taken in some cases, both in England and in this country, between goods obtained by fraud and by felony, and to the rule that in the former case a good title can be passed to a *bona fide* purchaser for a valuable consideration. This may be good law; but the readers of Mr. Story should have been told, that it has been recently questioned, both in England and in this country. The distinction appears to have been first made in the case of *Parker* v. *Patrick*, 5 *T. R.* 175; and Lord Denman, C. J., speaking of that case, in *Peer* v. *Humphrey*, 2 *Ad. & Ell.* 495, (29 *E. C. L.* 159,) says: "There, indeed, the Court distinguished between fraud and felony; but, in the argument for the present defendant, it is denied that such distinction can be taken: if so, the decision in that case was incorrect. And if the question of goods fraudulently obtained were before us, I cannot help thinking that the case of *Parker*

v. *Patrick* would not bear examination. The *Earl of Bristol* v. *Wilsmore*, 1 *B. & C.* 514, seems to me to be quite inconsistent with it." In the cases of *Ash* v. *Putnam*, 1 *Hill* 306, and *Thompson* v. *Rose*, 16 *Conn.* 82, there is also an expression of great doubt as to the propriety of any such distinction. Again, in section 454, the rule is stated as laid down in *Caswell* v. *Coare*, 1 *Taunt. R.* 566, as to the damages which the plaintiff may recover in an action upon a warranty in the sale of goods, where the price has been paid, being "the difference between the price actually paid, and the actual worth of the article at the place and time of delivery, with all its defects and vices." In the case of *Carey* v. *Gruman*, 4 *Hill* 625, and *Voorhees* v. *Earl*, 2 *Hill* 288, a different rule appears to have been established; and it is said, in the former case, that the amount of damages to be recovered is "such sum as, together with the cash value of the defective article, shall amount to what it would have been worth if the defect had not existed." The case of *Caswell* v. *Coare* is cited; and the rule there laid down restricted to the case, as it stood on the evidence, the only proof of the actual value being the agreed price; "and this should never be departed from, unless it be clear that such value was more or less than the sum at which the parties fixed it." 4 *Hill* 627. It is also shown, that these cases, in New York, are in accordance with the opinion of Lord Denman, C. J., in *Clare* v. *Maynard*, 7 *Carr. & Payne* 741, 6 *Adolph. & Ellis* 519. The only point decided, however, in *Clare* v. *Maynard*, "on the case coming before the whole Court, was, that the accidental loss of a good bargain, on the resale, did not form a proper item of claim, it being demanded in the declaration as the loss of a bargain. It was there admitted, however, that the jury might otherwise have considered the price obtained on the resale as evidence of the real value." 4 *Hill* 628. Other instances might be given, but the above will suffice to show that the remark as to the omission of Mr. Story in this respect, is not without foundation.

There is repeated several times in the work of Mr. Story an instance of the want of accuracy of expression, or want of knowledge, (the latter is scarcely credible,) that should not pass unnoticed. In section 430, he says, that the object of an action of trover "is to recover the goods themselves;" and in sections 446, 447, and 449, that goods may be reclaimed by an action of trover; and section 440 is as follows: "In the next place, if the vendee receive the goods, but refuse to pay for them, the vendor may, if the title to the property be not absolutely transferred. reclaim the specific goods in an action of

trover. Thus, if sale be made on condition, that unless the goods are paid for, or unless some act be performed by the buyer by a certain day, no property therein shall pass; upon the lapse of the time, the seller can reclaim the goods in an action of *trover.*" No authority is cited by Mr. Story for this idea of the action of *trover:* it certainly is not sustained by *Chitty* or *Saunders.*

Before parting with Mr. Story, an occasion which his work affords, will be used to make a remark on another subject. In section 412, is considered the amount of damages which may be recovered in case of a failure to deliver goods which have been purchased; and it is said, that if the price be paid, and the value of the goods be less at the time and place of delivery, still the vendee can recover the full price. To sustain this proposition, is cited *Pothier de Vente, No.* 69; and after stating in a note some dispute on the subject between foreign writers, there follows an extract from Pothier in French, interspersed with a little Latin of three closely printed pages. In some cases where there is doubt or conflict as to the rule of our law, it may not be amiss to have recourse, in the way of reasoning or illustration to the civil or foreign law. On such a proposition, however, as the one adverted to, there seems to have been but little occasion to call in any adventitious aid. But if there had been, the extract should have been translated. It may be safely asserted that not one in ten of the Judges and lawyers in the United States can translate that note; and in a work prepared for their use, it is scarcely proper that lengthy passages should be inserted, wholly unintelligible to the most of them, when the same learning that finds out the applicability of such passages, could so easily translate them into English.

CONFLICT OF JURISDICTION.

The *Cleveland Plaindealer* states a case in which the sheriff of that city has been in a quandary between two Judges. Judge Kelly, of the Common Pleas, issued a writ of *habeas corpus* to the sheriff to bring before him the body of a man named Connally. The sheriff brought him up, and while he had him in custody, awaiting Judge Kelly's decision, another writ of *habeas corpus*, issued by Judge Read, of the Supreme Court, was put into his hand to bring Connally up, to try the validity of the same mittimus. The sheriff took the prisoner before Read, and while he was absent, Judge Kelly decided that he should be remanded to prison. Judge Read heard the case, and ordered the prisoner to be discharged. These two contradictory decisions, on the same subject, threw the sheriff into a dilemma, from which he extricated himself for the time being by letting his prisoner go at large.

THE ELECTIVE PRINCIPLE AS APPLIED TO THE JUDICIARY.*

In our article upon the new Constitution of Illinois, in the last number of this Journal, we intimated that further views upon the elective principle, as applied to the Judiciary, might be presented, and the able speech of Mr. Peters on the subject noticed. This we propose at the present time.

A proposition having been made in Committee of the Whole to elect the Judges of the Supreme and Circuit Courts by the people, a motion was made to strike out the same, and substitute appointment by the Governor, by and with the advice and consent of the Senate. Mr. Peters advocated this substitute. In the opening of his remarks, he alluded to the unfavorable position in which he was placed, gentlemen having "assumed it as a fixed fact," as he remarked, that the elective principle was to become a principle of the organic law of the State. Though he should feel obliged to submit to the popular will, when clearly expressed, yet he could only do so "upon the clearest evidence that the sober jndgment of the community" was against him. Even then, he could not but entertain his previous convictions against the correctness of the principle contended for. He regarded the proposition as introducing "a new and almost untried experiment," and it appeared to him like "launching out upon an unknown sea, without a knowledge of the way, or the light of experience" for a guide. He felt that a "fatal stab" was being given "at the most important and conservative principle of the Constitution." Corrupt legislation, and an inefficient executive might, for a time, very much prostrate or retard the prosperity of a people; but for these evils there was a remedy in frequent elections, and in the popular wisdom. Unfortunately, it was not so with the Judiciary, who dispensed "life and death, liberty and slavery," according to fixed rules, previously promulgated, and well known to the community. So much by way of preface.

Mr. Peters then adverted to, and refuted one of the main arguments of those who advocated the elective principle:

"But, sir, upon what principle is it that we are to elect the judges? Gentlemen tell us that it is democratic. I deny this. I declare it to be *anti*-democratic. I go

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*Remarks of Mr. Peters, of Peoria, on the organization of the Judiciary, in Committee of the Whole, July 19, 1847.

further, and aver that, in adopting the principle of an elective judiciary, we violate one of the first and most important principles of American institutions: we violate a principle upon which every State of this Union, as well as the general government, has proceeded in establishing their constitutions. One of the principles on which we have unanimously agreed, which obtains the universal consent of this convention, is expressed in these words: 'The powers of the government of the State of Illinois shall be divided into three distinct departments, and each of them be confided to a separate body of magistrates, to wit: those which are legislative, to one; those which are executive, to another; and those which are judiciary, to another.' If all the other constitutions of the Union do not contain similar provisions, they all, at least, have gone upon this principle. All have agreed that the co-ordinate branches of the government shall, as far as possible, be independent of each other, and each limited to its own sphere of action. The executive is to see that the laws are faithfully executed, and shall have no voice in making those laws which he is to execute, except to exercise a limited veto, to check inconsiderate and hasty legislation. And though it may be that he is, in some sense, the representative of the whole people of the State, (as has been alleged upon this floor,) yet it is only in a limited sense, and with powers well defined, and to be exercised in prescribed limits. So far as it results from the fact that he is elected by the people, and in the exercise of his functions within an appropriate sphere, he is a representative. And here let me say, that when gentlemen claim that the Governor is a representative of the people—that he acts in a representative capacity—they admit away the principle on which they would base an elective judiciary. All admit that the legislative department of the government is intended to represent, to reflect the popular will; it is, if I may say so, the embodiment of the public will, manifesting that will in the laws which it enacts, fixing rules for the government and regulation of society. Its enactments bind all, and are intended to control the action of all. These enactments may be altered, and are always altered or abrogated, when the public exigency requires, and the public voice demands. So that the legislature reflects public sentiment, changing, varying, as the circumstances, business, wants and wishes of society shall direct. And a legislature that would disregard the wants and wishes of the community, that should disobey and disregard public sentiment, would be false to its trust. This duty of obedience is imposed upon the legislature, because it is elected by the people, and is the only convenient mode of expressing or ascertaining the will of the people.

"The principle of election necessarily implies the idea of representation, a reflecting of the popular sentiment; and this is the foundation of free government. An arbitrary government governs by its own will. It makes laws, and changes, repeals and executes them, as it judges best for itself or the people, and not as the people themselves shall desire. Representatives are elected, not for the purpose of re-affirming the public will as expressed in existing laws, but to enact new laws, to establish new rules to meet the wants, the wishes, the demands of an ever-changing community. In this is the most perfect freedom.

"Now, sir, let me ask what is the purpose, the object, of courts of justice? Is it to make laws? Is it to reflect the public will, as it may exist when the courts are called upon to decide in a particular case? Is it to listen to a public sentiment, and have its action controlled by it? No, sir, no. A court is for no such purpose as this;—but it is, that it may calmly, impartially and correctly declare what rule of action for the citizen has been fixed as the public will, in prior enactments, in already existing laws. Reflect public sentiment—be controlled by the public will? Why, sir, it is the great evil to be avoided. Have we not heard it intimated of particular judges, that they have sometimes made decisions because they were popular? That judges have violated law, in so deciding as to meet a popular feeling in the community? And does not our blood almost boil within us when we think that a judge has acted under such influences, instead of declaring the law as it is? Sir, what so soon will, what so completely ought to prostrate a judge, and cover him with eternal infamy and disgrace, as his yielding to public sentiment? The law has fixed for him a rule of action; it is a fixed rule, which every citizen at his peril must know and understand; and he has a right—it is his most sacred and inalienable right—that his life, liberty, property and character shall be protected according to that rule, and not according to a varying public sentiment. Let it now be proclaimed in this hall, that one of our judges has disregarded the law in a particular case, and yielded to the demands of a public sentiment not in conformity to the law, and a feeling of indignation would seize every heart, and one voice of universal condemnation would be heard. And yet, what do gentlemen ask us to do?—What do they want? What would gentlemen have? It almost shames me to an-

swer. They would elect judges by the people, so as to have the people represented upon the bench; to reflect the popular will in courts of justice!! How are the judges—how are the courts to represent the public will? Will gentlemen tell me that this will is to be reflected by the courts administering the law as it is? I deny this to be representation. The courts are merely to declare how that will has been before expressed. It is merely construing and applying a rule already fixed and made known. Representation implies a reflecting of a public will that is to control. Are your courts to be thus controlled? If they are not, why then refer to public sentiment at all, in connection with the judiciary. Why do gentlemen speak of election, (or of representation, which is the same thing,) when they themselves would shudder at the thought of having a court that is to represent any thing but the law as it is, not as a popular phrenzy may wish it to be? I ask the gentlemen to pause and reflect before they take this fatal step. I repeat, election embraces the idea of representation. This is the very purpose, the end and aim of popular elections; so that if you elect judges, you subject them to the control of a present popular feeling and will, instead of placing them beyond and above it, as they ought to be.

"Pure democracy is that which gives the greatest liberty and freedom to the greatest number, and best secures upon the firmest basis the rights of all; that secures those rights by fixed rules, and not subject to varied construction and application. To do this, Courts must be uniform in their decisions, and wholly disregard fluctuating public sentiment. I ask gentlemen to answer me on this point. If they tell me that the Courts are to represent the public sentiment, and reflect it from the bench, then I answer that they are prostrating all law, all justice, all rule of right. If they tell me that the courts are not to be the reflectors of public sentiment, then I answer they are needlessly and wrongfully resorting to the elective principle; that they are introducing a new element, an anti-democratic principle, into the organic law: that it is an absurdity to elect men to represent the community, when such representation is the least of all things to be desired—when such a representation would be fatal to the well being of the commonwealth.

"Elect the judges, and thus make them a representative body, and you have two representative departments in your government. You destroy your checks and balances. You overturn the first principle of your government, and deprive it of its most essential conservative power. You make all departments of your government representative, You leave nothing to check; your judiciary has the same basis as your legislative department. The same power appoints and re-appoints it. In doing this, one of the main and distinctive principles of American governments is lost sight of: our checks and balances are destroyed."

The propriety of the mode provided for by the substitute was then discussed. He thought that some confidence should be entertained in "the honesty, the integrity, and the discretion and judgment of the man whom the majority of the people had placed in the executive chair." He, as well as the Senators, had ample opportunity for knowing the character and qualifications of the nominee.—Ordinarily, there could be no inducement for confirming a bad nomination, and if two-thirds of the Senate were required for a confirmation, this of itself would be a great conservative power. Those in power were jealously watched, and this would be another safeguard against injudicious appointments. Another fact, and a very important one too—it tended to secure the independence of the judiciary, which must be preserved at all hazards. He went on to say:

"When a vacancy occurs on the bench, it will be the duty of the Governor to take the proper steps to fill it. He nominates to the Senate; here his functions begin.—The Senate confirms the nomination, and advises the Governor thereof, and there the functions of the Senate end. The Governor issues his commission to the appointee, and there *his* functions end. From that moment the judge, thus appointed,

is as entirely independent of the Governor and Senate as if they never had anything to do with making the appointment. The Governor and Senators soon retire to private life, and are swallowed up in the community. They have no further patronage for the new judge; he has none for them. All their relations have ceased, and he is entirely independent. If the judge is a good man, he may have feelings of kindness towards those who have elevated him; but it will be rare that they will come in his way, so that he could do them a favor officially, if he were disposed to do so. Thus, sir, all control is removed, and the judge is left to do his duty, and is responsible to his conscience and his God for the faithful discharge of that duty. The power of impeachment, and that only, is left to control his action, and bring him to punishment, for actual official misconduct."

Experience had tested the propriety of the appointment of judges by the executive, but, said Mr. Peters,

"We have no such experience to guide us in the election of judges. It is almost an untried experiment. In the State of Mississippi, in conformity to a provision of the constitution, the people elect their judges. The system has been in operation there somewhat more than twenty years. I am not very familiar with its history, nor how it has worked; but in the canvass for the election of judges which has recently been carried on there, I learn that a course has been pursued that ought to startle and alarm us. I may be misinformed; yet, I received this information from a source on which I rely, and which I believe to be correct. It is this:—a question has agitated the people of that State, whether the banks of the State shall be permitted to enforce, by legal process, the collection of large amounts of debts due from individuals to the banks. Those who are candidates for judgeship have been required to give opinions for or against the right of the banks to enforce the payment of these debts; and they have given such opinions, and the elections have turned, or were likely to turn, upon that question. Now, I know nothing of the merits of that controversy, nor, for the purpose of the argument, is it necessary to know its merits. It is sufficient to know that there is a controversy pending, which is to come before the judicial tribunals, whose duty it will be to decide according to the laws of the land; that they will, or ought patiently and impartially, to hear the parties, and then decide according to the law of the land and justice of the case under the law.—They ought to come to the consideration of the case with unbiassed minds. But instead of this, for the purpose of conciliating public opinion—for the purpose of obtaining an office; for the purpose of securing votes, they prejudge the case, and determine beforehand what the law is, and how the rights of the parties are to be disposed of. How monstrous—how revolting to the feelings of every man who has correct notions of the proper administration of justice! No matter how free the system has been from evil for twenty years, one such instance as this ought to alarm us, and ought to alarm the whole country.

"Again;—judges are made elective in the State of Iowa. A similar case has occurred there. As the facts are related to me, they are as follows: An election for judge was to come on in that part of the State embracing the half-breed reservation Much difficulty has existed there about their land titles. Questions of great importance have existed, as to whether certain grants were valid. The candidates were catechised as to their opinions of the validity of those grants. Their opinions were given. I am glad to say that the judge, after he was elected and took his seat upon the bench, patiently investigated the question he had thus prejudged, and after hearing the parties, overruled his electioneering opinion, and probably decided according to the law. But what assurance have we that judges will always act thus?—When we see such results growing out of the elective principle, men who are to decide upon and finally determine the most important principles of law, prejudging and predetermining the rights of parties, ought we not to pause and reflect? Do not these examples teach us—prove to us—that the people may not always act wisely in electing judges;—that elections will be conducted on such principles as violate all our notions of the purity of the correct administration of justice and the laws?"

The speaker briefly reviewed the judicial history of England to show the efforts made, from time to time, for the establishment of an independent judiciary, and alluded to the extreme caution of that

nation, which sought for judicial functionaries abroad. Spain and Prussia, also, received a passing notice, and the following anecdote was related:

"Frederick the Great, King of Prussia, as was his wont, had gone out from the city of Berlin, *incognito;* and, as he was returning upon the highway, he overtook a lad carrying some fruit. Frederick asked him for it. The lad refused. The king then proposed to buy it, offering more than its value. The boy still refused, saying he was carrying it to his mother in the city. Frederick then told him he would inform the king, if he refused him the fruit. The boy still insisted that he would carry it to his mother. 'Then,' said Frederick to the boy, 'I myself am the king, and you must give me the fruit.' The boy refused to yield, and replied, 'I care not if you are the king, for we have *judges* in Berlin.' A most noble sentiment, dictated by a feeling of security, inspired into the mind of the stripling by the existence of an upright and independent judiciary. This little anecdote, trifling as it may seem, well illustrates the great principle for which I am now contending. I have somewhere seen it stated, that Frederick often afterwards referred to it, to show how secure his people were under a good administration of the laws; and well might he boast of it, when he saw one of the humblest of his subjects, a boy upon the highway, resist his power and exultingly exclaim, "We have *judges* in Berlin."

In the extracts which follow, other evils and objections are pointed out and urged with much force by the speaker.

"But let us look a little further into the matter, and see if all the reasoning in favor of the elective principle is sound. Under our present constitution, every man, whether French or German; Norwegian or Swede; Greek, Hebrew or Barbarian, can come to this State, and in six months he is a voter. No matter if he does not know a letter of our alphabet, or a word of our language, he can vote, and his vote is as good as yours or mine, and contributes as much towards making a judge. Now, I am not going to rail against foreigners; with open arms, I bid them welcome here. But, sir, are they competent to judge of the qualifications of men in one of the greatest of all sciences—the science of law and government—on a six months' residence, without a knowledge of our language? Into one of the northern counties of this State, there came, last fall, it is said, fifteen hundred Swedes. I am also told they are a very sedate and respectable class of people. They are now voters. Suppose an election were to come on to-morrow for judges: can you tell me how those honest Swedes are to determine whether a gentleman living at Alton, or Shawneetown, has read, and studied, and understands Coke on Littleton, Chitty on Pleading, Starkie on Evidence? Whether he understands the law of contracts—of insurance—of the domestic relations, and of the thousand other titles and subjects in the law? How are they to obtain this knowledge? Who is to teach them? Who is to be their *interpreter?* Sir, the very statement of the proposition shows its absurdity; and were it not disrespectful to those here who entertain such opinions, and for whom I entertain the highest regard, I would pronounce it most unqualifiedly—absurd."

* * * * * * * *

"Let me present another, and, I think, a strong objection to the election of judges. Some gentlemen here, I find, are in favor of limiting the term of office of the judges to a short period, and make them re-eligible; others propose a longer (though not a very long) period, and make them ineligible. Now, sir, suppose you make them re-eligible, and you at once destroy their independence, and place them in the way of the most corrupting influences. When a man becomes a judge, you cut him off from other business, and other sources of income. He wishes a re-election. Unless he is different from most men, he will take measures to insure success. He will seek to make friends, to conciliate enemies and to secure influence. He will form intimacies with those who can command votes. His daily bread, the sustenance of his family, depends upon his office, perhaps. How can he be independent, when he has so much at stake, if called upon to decide against the man who can command votes enough perhaps to secure or defeat his election? When entangled in little cliques, and leagued with the heads of political masses, how can he escape their influences, when his living depends on their good will. He will have his sentinels placed out in the community, to spring at his word, or at the call of party, and to rally a party

clan to the rescue. Let gentlemen answer me this, and tell me, upon their consciences, if such a system will not destroy the independence of the judges, and corrupt the administration of justice?

"But suppose we say that the judges shall be ineligible, what then follows? I appeal to every lawyer who hears me if it is not true, that it requires years of experience upon the bench to make a good judge, even though he be a good lawyer when first placed there? A lawyer, when first taken from the bar, almost necessarily from previous habit, will look too much to one side of the case. Habit, and habit only, will make him such a judge as he should be.

"Render them ineligible, then and you necessarily have inexperienced and incompetent judges. Just as they become fitted for their stations, you turn them adrift because you fear corrupting influences; because—and I now utter a truth that ought to ring in our ears—*because, sir, you are afraid to trust the people!* This is not my sentiment, but that of those who will make the judges ineligible. By making them so, you declare your want of confidence in the people, and virtually say they are not wise enough, and shrewd enough, to elect their judges. You say that, when the candidate is almost a stranger to them, when they know him by reputation only, they may vote for him; but when he has been before them often for a few years, and they have seen how he administers the laws, then you say to them, 'You are not fit to judge of him; you shall not vote for him again; you must select another stranger.' Is this, sir, confidence in the wisdom of the people? Is not this very principle of ineligibility a greater rebuke upon the good sense and judgment of the people than any thing else that can be easily conceived. To such absurdities are we led when we depart from principle, and the path of experience."

We might give further extracts from this forcible speech, but we think we have shown sufficiently that the elective principle ought never to be applied to the judiciary. With Mr. Peters we believe it to be anti-democratic, that the judge is in no wise a representative of the people, but the exponent of their laws, and that his independence should be maintained at all hazards. If the office is elective, then farewell to all independence. It is not in human nature—though our faith in it is strong—to resist the temptations attending it. The system may be fastened upon the good people of Illinois, but we hope that in coming to a decision, they may be governed by good counsels; and if it should be decreed that the judges must be elected, that—and we fear it is a vain hope, considering the very inadequate salaries provided for,—men distinguished for probity and legal attainments may successively be called to the bench.

G.

KELLY'S (GEORGIA) REPORTS.

"Reports of Cases in Law Equity, argued and determined in the Supreme Court of the State of Georgia, in the year 1846, by James M. Kelly. Vol. I. New York: pp. 679."

PRIOR to the year 1846, there has, we believe, been no appellate Court in the State of Georgia. By an act of the General Assembly of that State, passed 10th December, 1845, a Supreme Court, consisting of three Judges, was established; and the volume above mentioned contains the result of their first year's labors. It is very closely printed, and contains, as stated by Mr. Kelly, in his preface, nearly enough matter to fill two volumes, in the ordinary style of publishing reports. We may, therefore, confidently expect that Georgia will hereafter contribute annually a volume to the stock of American reports. Indeed, the reporter is required, by the act above referred to, within four months after the sessions of the Court for each year have closed, to publish reports of the decisions made during such year, under a penalty of the forfeiture of one fourth of his annual salary. We notice in the same section of the act a restriction on the reporter, that "he shall not, during his service as reporter, appear as counsel, or act as attorney in any case in any Court in this State." This restriction is unusual, and the reason for it is not very obvious.

Upon looking into some of the cases contained in this volume, they exhibit evidence of learning, research and ability in the discussion and decision of the different questions submitted. We notice among the points decided the following:

"Where an instrument is drawn and executed for the purpose of carrying into effect a contract written or parol, previously entered into, and which, by mistake of the draftsman, in fact or in law, does not fulfil the intention of the parties, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement." *Rogers* v. *Atkinson et al.* 12.

"The question whether a garnishee is liable for interest upon the fund in his hands, or the debt owed by him, which is sought to be recovered by process of garnishment, is not one of strict law, but of discretion, depending upon considerations of equity growing out of the facts and circumstancee of the particular case."

"When the garnishee resists the payment of the fund in his hands into Court, or controverts his indebtedness, he will be held liable for interest."

"It a general rule, that persons who are prevented from paying over money by process of the Court, as summons of garnishment, writs of injunction, and the like, are not liable for interest." *Georgia Insurance & Trust Co.* v. *Oliver*, 38.

"The maker of a note (who is released) is a competent witness to prove usury in its consideration, in a suit by an endorsee against an endorser." *Winkler* v. *Scudder* 108.

In this case the question whether the party to a negotiable instrument can be permitted to show that there was any invalidity in it when it passed out of his hands, was investigated both by the counsel and the Court with great care, and nearly all the authorities in England and in this country were cited and examined. The Court determined to follow the rule in *Jordaine* v. *Lashbrooke* in preference to that of *Walton* v. *Shelley*. The rule in the latter case having been adopted by the Supreme Court of the United States, in several cases, the Supreme Court of Georgia was urged to follow those decisions. It may be useful to insert the remarks of the Court on this point.

"The authority of the Supreme Court has been invoked in behalf of the plaintiff in error, with great strength of reasoning and eloquence. It is claimed that the Supreme Court is the highest and most authoritative tribunal known to our Union, and that its decisions form an elevated rallying point for the courts of the States. That with a view to uniformity and harmony, it is better for this Court to conform to its decisions, than to abide by the authority of other courts, however imposing in their organization, or distinguished by their learning. We promptly and cheerfully admit the commanding character of our great national tribunal—the ability of its judges, and the desirableness of harmony between it and the State courts. One answer to these views is to our minds conclusive, and that is—the decisions of the Supreme Court are not the law of this Court—the common law as it stood in May, 1776, is. To this branch of the argument we shall again advert. Aside from this fact, the decisions of the Supreme Court upon this subject, come to us as naked adjudications—without reasoning—without any attempt at a collating and balancing of authorities. They seem to be rather in character of *dicta*, than solemn judgments. Their authority is that of the Court, and not of argument or learning."

"The Court, seems, in no instance, to have been desirous of settling this vexed question by authority or reason; but to have been content with the enunciation of its own opinion. The meagreness of these decisions must strike the most careless reader. This is the more remarkable, since at the time of giving them, a contrary doctrine prevailed in England, and in many of the American States. We pretend not to account for the fact. We only know that such is the fact.

"Now the authority of the Supreme Court is, in this Court, the moral power of reason and the weight of legal learning. Upon this question it is not commended to us by either, and must yield to other considerations, which we esteem as conclusive upon us."

The idea to be gathered from the above remarks, that the authorty to be given to the decisions of a court depends on the reasoning and legal learning by which they are sustained, cannot be too strongly enforced, and is as applicable to the highest tribunals as to those of lesser importance. Indeed, it would seem, that the higher and more commanding the tribunal, the greater should be its obligation to support and sustain its decisions by reason and authority. But to proceed with the points decided:

"When a surety, who is indemnified by mortgage, voluntarily pays a usurious note, and is subsequently reimbursed by his principal, *in property*, the latter cannot recover of the creditor the excess of interest in an action for money had and received. Per Lumpkin, Judge."

"Usury paid by a surety may be recovered back by him, in this form of action, but not by the principal, though he has reimbursed the surety. There is no privity of contract either express or implied in law, between the principal and his creditor, in such a case. Per Nisbet, Judge."

"If the surety have knowledge of the usury, and voluntarily pay it, he cannot afterwards recover it of his principal."

"The payment of usury by the surety, and his subsequent reimbursement by his principal, do not, in law, constitute such surety the agent of his principal, by *ratification*." *Whitehead* v. *Peck*, 140.

"Although a surety on appeal is interested, by reason of his suretyship, and therefore incompetent as a witness for the appellant—yet his competency may be restored, by the substitution of another surety in his place, under an order of the court, taken for that purpose, which for the advancement of justice, the court ought to permit upon application. The refusal to allow it is error." *Davis, et al.* v. *Anderson, et al.* 176.

"In order to impeach a witness, by showing that he has made contradictory statements, it is not necessary that he should absolutely deny the declaration imputed to him. It may be done when he says he does not recollect, if the subject matter of these conversations be relative to the issue."

"Witnesses who testify as to what they saw respecting a transaction after night, and by starlight, aided by lamps upon the surrounding buildings, cannot be impeached by persons who propose to prove that they have made experiments on other nights, between the same hours, and with the same degree of light, and were unable to discern objects accurately." *Sealy* v. *State of Georgia*, 213.

"A promise by one person to indemnify another for becoming security to a third, is not within the statute of frauds, and need not be in writing. And the promisee may recover of the promise

the whole of the moneys which he was compelled to pay by virtue of the bond on which he entered. The assumption of the responsibility is a sufficient consideration for the promise." *Jones* v. *Shorter et al.* 294.

This point was decided on the authority of the cases of *Thomas* v. *Cook*, 8 *B. & C.* 728, 15 *E. C. L. R.* 333; *and Chapin* v. *Merrill*, 4 *Wend* 657. Had the learned Court extended its researches a little later, it would have found that the first case, decided by only two Judges, was disapproved in the subsequent case of *Green* v. *Cresswell*, *Ad. & Ell.* 453, 37 *E. C. L. R.* 142; and that the case of *Chapin* v. *Merrill* was much shaken, if not overruled, as an authority in the case of *Conville* v. *Crane*, 5 *Hill*, *N. Y. Rep.* 483. The point has, however, been ruled the same way in *Holmes* v. *Knight*, 10 *N. Hamp.* 175.

"Although an instrument contains, at the foot of it, a memorandum specifying the mode in which it may be discharged, still, if it be for a sum certain, payable absolutely and unconditionally, on a day fixed on the face of it, it is a good negotiable promissory note, and may be declared on as such." *Pool* v. *McCrary et al.* 319.

"In a suit upon a note payable upon time, with interest from date, if not punctually paid, the back interest is recoverable as stipulated damages." *Alexander* v *Troutman* 469.

"When a statute, granting a charter to a rail road company, provides for the assessment of damages in a summary way, to be paid to the land-holder whose private property shall be taken for the use of the road, there being no negative words in the statute, express or implied, the land-holder, whose property is thus taken, is not deprived of his common law remedy to recover damages therefor: the statute creates no new right, and being in derogation of a common law right, must be strictly construed; the summary remedy given by the statute is cumulative only."

"Private property cannot be taken for public use without a just compensation; and where a rail road charter provides, adequate security shall be given to the land-holder, whose property shall be taken for the use of the road, for the payment of such damages as shall be assessed in the manner pointed out thereby, no title to the land thus taken vests in the company, nor can the company appropriate the same to the *exclusive use* of the road, so as to defeat the right of the land-holder to maintain trespass in ejectment therefor, until such adequate security shall be given; and it is incumbent on the defendants to allege in their plea, and prove at the trial, that the provisions of their charter in that respect, have been strictly complied with, before the land-holder can be deprived of his title to his property, for the use of the public." *Doe ex dem. Carr* v. *Georgia Rail Road and Banking Co.* 524.

The above comprise only a part of the important and interesting points decided, and reported in this volume, and may suffice as examples.

NOTES OF RECENT DECISIONS.

Heath v. *Unwin. English Court of Chancery*, 1847. [16 *Law Journal Reports, Chy.* 283.]

PATENT—INJUNCTION—SECOND TRIAL AT LAW.

The plaintiff, having obtained a patent for an improved method of making steel by the application of carburet of manganese, brought an action against the defendant for infringing his patent by using two ingredients, which, when fused, would produce carburet of manganese. The Court of Exchequer held that the patent had not been infringed, either directly or indirectly, because the defendant was ignorant of the fact that he was using the same substance as that employed by the plaintiff. A motion for an injunction upon a bill filed prior to the action was now opposed, on the ground that the decision of the Court of law was final, and the bill ought to be dismissed. The Court considered that although the act was committed unconsciously, the defendant was liable for the injury he had done, and consequently retained the bill, and gave liberty to the plaintiff to bring another action.

In re Spence. English Court of Chancery, 1847. [*Ib.* 309.]

INFANT, CUSTODY OF—HABEAS CORPUS—PETITION—JURISDICTION.

The Court has jurisdiction, on the petition of a parent or guardian, to order infants to be restored to the proper custody without a bill being filed.

A mother had removed her infant children, and was residing with them at some place which was not known to the husband; but the trustees of her marriage settlement were in communication with her, and remitted dividends to her. The husband obtained a writ of habeas corpus against the trustees for the delivery of the children. The trustees stated, that the children were not in their custody, or under their control. The Court refused to make any order against the trustees, although they were aware of the residence of the mother; nor would it control their right to transmit their dividends to her.

Dormay v. *Boradaile. English Court of Chancery*, 1847. [*Ib.* 337.]

LIFE INSURANCE—CONSTRUCTION—COVENANT TO KEEP UP POLICY—SUICIDE OF COVENANTOR—WILL—LEGAL OR EQUITABLE ASSETS.

A testator, by his will, after devising his real estate to his executors for the benefit of his wife and children, expressed himself as follows: "My executors are charged with the payment of my just debts, of which I shall leave an account with the letter named above to my dear wife:" Held, that the testator's real estates were equitable assets for the payment of his debts.

The same party, previously to his marriage, covenanted with certain persons as trustees to pay, during his life, all premiums and other moneys, and do and perform all such acts, matters, and things as should be requisite for keeping on foot a policy

of assurance previously effected by him on his own life; and the policy contained a proviso, declaring that it should be void in case the party should die by his own hands. The party was afterwards drowned in the River Thames; and by the verdict of a jury, returned in an action at law, directed by the Court to be brought by the executors of the settlor against the Assurance Company, it was found "that the settlor threw himself into the River Thames, intending to destroy himself, but that at the time of committing the act he was incapable of judging between right and wrong:" Held, that the trustees of the settlement were not entitled to claim as against the settlor's estate the sum secured by the policy.

Spence and another v. *Chadwick. Court of Queen's Bench*, 1847. [*Ib.* 313.]

COMMON CARRIERS—CONTRACT—SHIPPING—FOREIGN LAW—SEIZURE BY REVENUE OFFICERS.

To an action against the defendant for breach of a contract to carry goods of the plaintiff safely by ship from Gibraltar to London, calling at Cadiz, the act of God, the Queen's enemies, fire, and dangers of the seas, rivers, and navigation (save risk of boats) excepted, the defendant pleaded that the ship, in the course of the voyage, called at Cadiz, according to the terms under which the goods were shipped. and that while there, and within the jurisdiction of a Court of the Revenues in Spain, the said goods were, by the proper authorities having jurisdiction in that behalf, lawfully taken out of the ship against the will, and without the consent, neglect, or default of the defendant, on a charge of suspicion that they were contraband according to the laws of Spain; and were afterwards, by a decree of the said Court, duly made according to the law of Spain, declared to be and were confiscated, whereby the defendant was prevented from delivering the goods: Held, that the defendant was liable, as he had failed to bring himself within any of the exceptions in his contract, and nothing was stated from which it appeared that either party knew or was bound to take notice of the revenue laws of Spain.

Hoskins v. *Phillips and another. Court of Queen's Bench.* [*Ib.* 339.]

ATTORNEY—NON-EXISTING PLAINTIFF—COSTS—LIABILITY.

An attorney, although he need not be instructed by a plaintiff personally, but may receive instructions from any one interested in the action, is liable to the defendant for costs, if it turns out that the plaintiff is a non-existing person.

Eager v. *Grimwood. Exchequer of Pleas*, 1847. [*Ib.* 236.]

SEDUCTION—TRESPASS—LOSS OF SERVICE—DAMAGE.

A father or master cannot maintain an action for the seduction of his daughter or servant, without some proof of loss of service. The law does not imply damage to the father or master from the mere act of seduction.

Dyer v. *Green. Exchequer of Pleas*, 1847. [*Ib.* 239.]

EVIDENCE—BILL OF SALE—SCHEDULE ANNEXED.

A bill of sale transferred to the plaintiff "all the goods, fixtures, household furniture, plate, china, and effects of whatever kind belonging to us, and in and about the messuage, tenement, or premises, where he now resides, and being No. 2, Park

Road, Old Kent Road, in the county of Surry, and the chief articles whereof are particularly enumerated and described in a certain schedule hereunto annexed. The schedule being inadmissible in evidence, by reason of its not being annexed,—Held, that the bill of sale was admissible without the schedule.

Matchin v. *Matchin.* *Supreme Court of Pennsylvania*, 1847. [10 *Law Reporter*, 266.]

DIVORCE—INSANITY—ADULTERY.

A wife's insanity is not a bar to a divorce for adultery committed by her when she was insane.

Her confession of the fact is competent evidence of it, only when it is corroborated by circumstances of it, and free from suspicion of collusion.

The confession of her paramour is evidence against her only when it has been communicated to her, and confirmed by her.

The fact of adultery may be proved by evidence of circumstances.

The People v. *John Brooks.* *Supreme Court of N. Y.*, 1847. [*Ib.* 301.]

CONSTITUTIONAL LAW—COMMERCE.

A state law, imposing a tax upon the *officers* and *crew* of vessels coming within the state is unconstitutional, because it conflicts with the power of the federal government to regulate commerce, which power has been exercised by congress.

Assay v. *Hoover.* *Supreme Court of Pennsylvania.* [7 *Pa. L. J.* 21.]

WILL—SIGNATURE—MARK.

The true construction of the 6th section of the act of April 8th, 1833, "relating to last Wills and Testaments" is, that the testator must sign the testamentary instrument by his own proper signature, if he be able to do so, but if prevented from doing this by sickness, infirmity, or other incapacity, recourse is to be had to the alternative mode of authentication pointed out by the statute, to wit, signing the testator's name to the instrument, at the end thereof, by some person in his presence, and by his express direction, and both the incompetency and signature by express request, must be proved by two witnesses. A *mark* made by the party proposing a testamentary disposition, is sufficient in any case, and so is the name of such party written by another person, unless so written in accordance with the directions of the statute.

Miscellaneous.

Marvin's Legal Bibliography. [Legal Bibliography, or a Thesaurus of American, English, Irish, and Scotch Law Books—together with some Continental Treatises—interspersed with Critical Observations upon their various Editions and Authority. To which is prefixed a copious List of Abbreviations. By J. G. Marvin, Counsellor at Law. Philadelphia: T. & J. W. Johnson, Law Booksellers. 1847.]

In this teeming age of legal book-making, we are glad to see that some one has had the fortitude to undertake the task of compiling a general catalogue of law books. We have here a volume of 800 pages, giving, in the first place, nearly 50 pages of abbreviations, which cannot fail to be eminently convenient and useful both to the student and practitioner in referring to authorities; next, about 700 pages filled with the titles of works, editions, and comments upon their merits from reliable sources; and finally, a copious index of subjects, alphabetically arranged, as are also the preceding portions of the book, with a list of the authors who have written or published works on the same. This statement of its contents, so fully set forth in its title, is a sufficient indication of its convenience and utility. Mr. Marvin deserves well of the profession for his labor, so well executed on his part.

We take the liberty to suggest an error which has found its way into the list of abbreviations, as slightly affecting *us*. It is this: "*Gil.*, Gilman's Reports," with a foot note appended, thus: "They are commonly cited as *Virginia Reports*." The error is in the reporter's name, which should be *Gilmer*, who published but one volume of reports of cases, decided in the Virginia Court of Appeals. Gilman's (Illinois) Reports comprise, thus far, three volumes, and should be cited thus: 1 Gilm., 2 Gilm., &c. G.

Story's Reports, Vol. III. [We give place to the following communication from a subscriber in Tennessee, because we think his complaint to so some extent a just one; although, so great is our regard for the Reporter, and our veneration for the Judge, that we were not so strongly impressed with the evil in this particular case, as we often have been with other reports—especially those of Peters and Howard. Eds.]

"We know of no evil more to be deprecated in this good country of ours, than that induced by the abuse most wanton of the art of book-making; and, while we care not how much the brains of these workers in the art of compiling are racked to fill a quarto, when the importance of the subject investigated is not such as to demand the attention of the public, yet, when it pleases one of those who are troubled with what has been aptly called the "*cacoethes scribendi*," to palm upon *the profession* a work so completely clouded with all the verbosity and voluminousness exemplified now and then in the literary world—but which we are compelled to stomach on account of the now and then grains of wheat carefully concealed in the bushel of chaff—which are indeed precious to the disciple of the law—human nature,—at all events, the human nature of the poor lawyer, must rebel,—and in rebelling, must be allowed to give vent to his opinion. It is almost impossible, now-

a-days, as it is, for a lawyer with moderate means, to keep up with these multipliers of editions, who pour out almost monthly upon him, edition after edition of some standard work, and that too with the pretence that they are "carefully revised and corrected," and with many important additions to the text, and cases cited. But where we see a man publishing a book of Reports—Reports, too, of decisions of one of the ablest Judges that ever sat upon the bench—decisious sought for far and near, and which are justly deemed absolutely necessary, we must cry out when we see the faults in it, we have already mentioned, and we reluctantly bring upon young Story the charge of desiring with malice aforethought to impose upon the *pockets* and upon the good nature of the profession. We refer to the last volume of Story's Reports—W. W. Story, Little & Brown, Boston—containing all the *last* decisions of his most eminent father. Such a conglomeration of *nothings* we never had the fortune, (thank heaven,) to see in a *law book* before. The enormous, overgrown size of the book attracted our attention when we got hold of it; and, hoping to find a treat indeed, we opened it, expecting to find it overflowing with the richest evidence of the Judge's great power; and sadly were we disappointed. The cases are few, very few—all equal to the former decisions of the Judge, and some, such as that in the case of *Jenkins* v. *Eldredge*, even excelling them, and which as cases, had they *alone* been reported, would have been thankfully received, though in a *small* volume, as the richest contributions to the legal treasure-house. But enlarged, uselessly as it is, its price is increased four-fold; and the humbler, poorer worshiper at the shrine of Justice, is compelled to forego the pleasure of possessing it. Examine the volume, and you will find the *bills* and *answers*, spreading as they do through 30, 40, and 50 pages—a thing unparalleled in *law* book-making—and even the very *demurrers*, and *joinders* in demurrer! Our young friend should remember that he is materially injuring himself in the eyes of the profession he loves; and if he would recollect next time that it is much better "*scribere multum, plus quam multa*," he will be doing himself and his friends a favor inestimable. How much better it would have been, to have given a neat, succinct statement of each case, in doing which a man well shows his power of mind, and then to have given the decision at length—for after all, it is the *decision* we want, and that alone. The impression made on the reader's mind unavoidably is, that as this is perhaps the last *pull* upon the public that he would have, the author seems to have endeavored to make a "*long pull, and a strong pull, and a pull altogether*," on the pockets of the legal profession; and to our mind he has succeeded excellently well! Such a thing is not worthy of Mr. Story; and we are sorry he has forgotten to such a degree what is due to himself and to the profession. We might particularize, but will not; nay, we might make *comparisons;* but, knowing that they are sometimes '*odorous*,' and hoping he will sin no more, we respectfully give this hint to the young compiler."

Extradition—Case of Metzger, under the Treaty with France. [*From the Nat. Intel.*] We understand that the decision of Judge Edmonds, referred to in our yesterday's paper, in the case of Metzger, a fugitive from France, does not settle the point of law involved in the question. The President of the United States issued an order of extradition against Metzger, in conformity with the Convention with France, after the competent judicial authorities had ordered his commitment. In the course of the previous proceedings, the Supreme Court of the United States had decided, upon an application made to them for a writ of habeas corpus in favor of Metzger, 1st, that the Convention of extradition with France was valid; 2d, that the proceedings under it in the present case were regular; 3d, that Judge Betts, of the United States District Court of the State of New York, who had ordered the commitment of the fugitive for the purpose of his surrender, was a competent authority in the

matter; and 4th, that no legislative act was necessary to enforce the execution of the Convention. Judge Edmonds has taken upon himself to reverse the decision of the Supreme Court, so far as the person of the fugitive is concerned, and has ordered his discharge. But his opinion does not settle the point of law, although it disables the Government of the United States from carrying into effect, in this instance, what is understood to be its construction of its treaty obligations with France; and we learn that the Executive of the United States, far from acquiescing in the opinion of Judge Edmonds, has resolved to bring the question again before the Supreme Court, to test lhere the constitutionality and legality of its own act. The Convention with England for the extradition of fugitives from England, under which the surrender of criminals has frequently been effected on both sides, has, no more than that with France, the support of a legislative act to enforce its execution, and it will thereby be seen that the doctrine of Judge Edmonds not only invalidates that Convention also, but renders unconstitutional and illegal all proceedings had under it since its promulgation.

Saving-Fund Society—Statute of Limitations. It was lately decided in the District Court of Philadelphia, that a Saving-Fund Society cannot, under ordinary circumstances, take advantage of the Statute of Limitation. The same case (*Moore* v. *the Philadelphia Saving Fund*) was tried before a jury, a short time since, who rendered a verdict for the plaintiff. Some points of law were reserved, however, and among them the Statute of Limitation—which has been specially pleaded and relied on by the defendants—to be argued before the Court in Bank. On all these points, the Court decided in favor of the plaintiff—thus negativing the monstrous doctrine, that a Savings Society may induce persons to deposite their money, and then plead the Statute of Limitations against them.

Champerty. [We take the following from the *Western Empire.*]

The points decided in the following case (which we copy from the Alleghanian, of Cumberland, Md.) are full of interest to the lawyer, and of importance to the citizen. A directly contrary decision was made by our Court in Bank, on the first point, in *Cressenger* v. *Welch*, 15 *Ohio Reports.* The question of Champerty was decided the same way in the same case. In *Dawson's Lessee* v. *Porter*, 2 *O. R.*, it was held that a deed from the lessor of the plaintiff, made after suit brought, was inadmissible to defeat the plaintiff's recovery.

This case engrossed five days' time of our County Court. It was opened on Thursday, of last week, and was given to the jury on Tuesday evening last.

Joseph Cresap's Lessee v. *Henry M. Hutson.*

This was an action of Ejectment, brought to recover two soldiers' lots, and, although the land in controversy was of small value, the case was one of the most closely contested that was ever tried in Alleghany County Court. And a deep interest was felt in it, on account of the very important legal questions that were discussed and decided in the course of the trial.

Messers Price and T. I. M'Kaig, were the counsel for the plaintiff, and Messers Sommes and Pearre for the defendant; and although the skill and tact of the counsel were the subject of admiration to all who were present, there can be no doubt that the investigation satisfied every intelligent observer, that our ejectment system is one of the most unwieldly and expensive that human wisdom could possibly have devised, and that in the hands of able counsel, its rules may be used for oppressing the weak, by preventing honest claimants from possessing their rights.

The Court decided, that a deed made by a party who has the legal title, while

the property conveyed is in the adverse possession of another, is void. That a party to be entitled to recovery in ejectment, *must have title at the time of the trial.* And as the plaintiff in this case had made a deed to his two sisters, after the commencement of the suit for the property claimed, his right to recover depended upon the validity of the deed. Upon this question the following points were decided: First, that a party is competent to show the invalidity of his own deed. Second, that a deed conveying preperty for which an action was pending, was not void for Champerty, the English statutes upon this subject not being in force in Maryland.

Upon the question of possession, the Court decided that a party by exercising acts of ownership over part of a tract of land which he supposed to be his, but without intending to claim anything to which he had not a legal title, was not in such a possession of a part as would give him a constructive possession of the whole, unless he had title to the whole.

The verdict of the Jury was for the defendant.

Confesssion to a Priest inviolable. Some time ago a Mr. Hotten, in Baltimore, was robbed of sundry valuable papers, which were taken from a desk in his office by means of a false key. Some days after, the papers were returned to Mr. Hotten by Rev. Mr. Hickey, a priest of the Roman Catholic Church; and a young man named Greacen, was arrested as the supposed robber. Mr. Greacen was brought to trial. There was no evidence to convict him, and Rev. Mr. Hickey refused to testify, the facts having come to his knowledge under the seal of confession. His right to refuse was admitted by the Court, and Mr. Graecen was acquitted. It is proper to say, that evidence tending to prove him innocent was adduced on the part of the defence, and that strong testimony of good character was given in his favor.

Fugitive. In the U. S. Circuit Court, at Pittsburgh, a penalty of $500 has been awarded against Dr. Mitchell, of Indiana county, for enticing a slave from his master. The case was tried under the act of Congress of 1793, and for the penalty imposed by that act. The decision in this case goes somewhat farther than the famous Van Zandt case of Ohio. In that case, decided at Pittsburgh, there was no proof of any attempts on the part of Dr. M. to entice the slave away from his master. Nor was there any proved interference to prevent their return to their owner. He gave them employment, however, knowing them to be slaves, and according to the charge of the Judge, and the inference of the Jury from the charge, there was room for the verdict rendered. In Judge McLean's charge, the act of employment simply was not deemed an offence under the act of Congress. The Pittsburgh Gazette says the case occupied the Court four days. Judge Grier's charge was pointedly against the defendant.

United States Digest. The Supplement to this work, by I. P. Putnam, Esq., of the Boston Bar, in two volumes, it is stated, will be ready for the public in the course of this month. The whole will form a complete digest of all the decisions in the Common Law and Admiralty Courts of the Union, down to the commencement of the present year. This is a most desirable work for the profession throughout the country. G.

Western Eloquence. A Western lawyer, (in the far West, we presume,) defending a thief, wound up his speech to the jury in behalf of his injured client with the following rousing appeal: "True, he was rude—so are our bars: true, he was rough—so air our buffalers. But he was a child of freedom; and his answer to the despot and the tyrant was, that his home was in the bright setting sun!"

Patmore v. *Trustees of Seventh Ward, Cincinnati.* This was an action on the case against defendants for refusing the plaintiff's vote at an election. We are informed by one of the counsel engaged in the cause, that on the trial at the November term of the Com. Pleas of Ham. co., the counsel for the defendants asked the Court to charge the jury that the plaintiff was not entitled to vote at the election in question, unless he brought himself within the provisions of the 4th section of the "Act to provide for registering the names of electors, and to prevent frauds at elections," which instructions the Court refused, and charged, in substance, that the provisions of the act referred to, restrictive of the right to vote unless the electors' names were registered, were unconstitutional.

Special Pleading in Missouri abolished. We understand that all special pleading is abolished in Missouri by an act of the Legislature. This act provides that no special plea shall be allowed in any case, and that the general issue in all cases shall be as follows: "The defendant comes and defends the plaintiff's demand." In an action of assumpsit, in the Common Pleas, at St. Louis, recently, the defendant filed a plea of non-assumpsit in the ancient form. The plaintiff filed a motion to strike out the plea, and render judgment by default, and that motion was sustained by the Court. This plea, prescribed by the statute, covers every kind of defence.

Liquor Dealers—Liability for selling to a Slave. We take the following from the New York Tribune:

A case was lately decided in the Court of Common Pleas, in the Kershaw District, South Carolina, involving considerations of vital interest to the slave owners of that State. It appears that a grog dealer sold the plaintiff's slave, Bob, a gallon and a quart of whisky; that on the road home, Bob drank of the whisky, became very drunk, fell down several times, and once in a creek, and would probably have been drowned, if he had not been assisted out; that he lay out all night, and was found dead near the road the next morning; that his death was caused by the intoxication, and exposure to the inclemency of the weather. The jury, under the charge of the Judge, found a verdict for the plaintiff for six hundred and fifty dollars.

Passengers. An important decision has recently been made in Liverpool to the following effect: That a person contracting to carry passengers from one port to another, is liable for the passage money, if he fails to fulfil his contract even by reason of the wreck of the ship. The passengers of the Rochester, which was wrecked a short time ago on the coast of Ireland, under this decision, recovered their passage money and costs of Court.